TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 263

FIDELITY-PHILADELPHIA TRUST COMPANY, AND ROBERT A. WORKMAN, EXECUTORS OF THE ESTATE OF ANNA C. STINSON, DECEASED, PETITIONERS,

vs.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 17, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

APPENDIX TO BRIEF FOR APPELLANTS

INDEX TO APPENDIX

APPENDIX.

1. DOCKET ENTRIES.

1941		
June	11	Complaint filed.
June	11	Summons exit.
July	29	Summons returned "on June 11, 1941 served" and filed.
Aug.	19	Answer filed.
Aug.	21	Order to place case on Trial List filed.
Dec.	6	Order to place case on Trial List filed.
1942		
Feb.	16	Trial—Witnesses sworn c.a.v.
Feb.	25	Testimony filed.
Apr.	4	Defendant's requests for findings of fact and conclusions of law filed.
Apr.	15	Plaintiffs' requests for findings of fact and conclusions of law filed.
1943		
Jan.	8	Opinion, Ganey, J. granting judgment for defendant filed.
Jan.	8	Judgment in favor of defendant with costs filed. 1/9/43 Noted & Notice mailed.

Feb.	12	Plaintiffs' Notice of Appeal filed. 2/13/43 Copy to G. A. Gleeson, Esq.
Feb.	12	Copy of Clerk's Notice to U. S. Circuit Court of Appeals filed.
Feb.	12	Bond for costs on appeal in $250., with Travelers Indemnity Co., surety filed.
Feb.	12	Designation of Record on appeal filed.
Feb.	12	Stipulation of Agreed Facts filed.

2. COMPLAINT.

The plaintiffs complain against the defendant and allege as follows:

1. Fidelity-Philadelphia Trust Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania having a place of business at 135 S. Broad Street, Phila elphia. Robert A. Workman is a citizen of the United S tes residing at 426 Montgomery Avenue, Haverford, Pennsylvania.

2. The defendant, Walter J. Rothensies, at the times herein referred to was and is the Collector of Internal Revenue for the First District of Pennsylvania and resides in the Eastern Judicial District of Pennsylvania. This is a suit of a civil nature to cover estate taxes erroneously paid to the defendant and is upon a cause of action arising under the Internal Revenue Laws of the United States.

3. Anna C. Stinson died November 17, 1934, a citizen of the United States, residing at Morris and Yarrow Avenues, Bryn Mawr, Montgomery County, Pennsylvania, leaving a will dated June 6, 1930, which was on November 22, 1934 duly admitted to probate by the Register of Wills of Montgomery County, Pennsylvania. A copy of said will is hereto attached, made a part hereof and marked "Exhibit A". On November 22, 1934 letters testamentary were granted by said Register to plaintiffs, Fidelity-Philadelphia Trust Company and Robert A. Workman, and the said plaintiffs became and now are executors of the estate of said decedent.

4. On March 26, 1928 the said decedent made, executed and delivered a certain trust indenture, a copy whereof is

hereto attached, made a part hereof and marked "Exhibit B".

5. In the trust so created there were, on the date of decedent's death, securities having a value on that date of $84,433.39. The assets of said trust were acquired by transfer from decedent prior to March 3, 1931 as follows:

March 26, 1928 $65,000. cash;

May 31, 1928 $10,000 cash; and

$25,000 par value United States of America 3rd Liberty Loan 4¼s due September 15, 1928 which were redeemed at par on September 15, 1928.

The assets in said trust at the time of decedent's death are the proceeds of said funds all received prior to March 3, 1931.

6. On or about September 5, 1935 plaintiffs prepared and filed with defendant at Philadelphia an estate tax return for the estate of said decedent showing an estate tax due of $53,386.59 and on said date paid said tax to the defendant as Collector of Internal Revenue at Philadelphia. The assets of said trust were not included in the taxable assets of the estate, but notice of the trust was placed on the return.

7. The Commissioner of Internal Revenue and the defendant subsequently contended that the assets of said trust should be included in the taxable estate of said decedent and subsequently, to wit, on December 24, 1936, plaintiffs paid to the said Collector of Internal Revenue the further sum of $17,555.63, $16,554.33 thereof as additional estate tax upon the estate of said decedent in part by reason of inclusion of the assets of the said trust and interest of $1,001.30.

8. At the time of her death the said decedent was survived by two daughters, Florence V. Stinson and Nancy C. Stinson.

9. The Presbyterian Hospital in Philadelphia, The Contributors to the Pennsylvania Hospital, The Philadelphia Home for Incurables and the Board of National Missions of the Presbyterian Church of the United States of America were in existence upon the date of decedent's death, and still are in existence, and have capacity to take and receive gifts and bequests, and are and were all charitable or religious corporations or associations within the meaning of the Revenue Laws of the United States in force upon the date of this decedent's death, and bequests to them, or any of them, are deductible in determining the taxable estate under such laws.

10. The will of said decedent is valid under the law of Pennsylvania in force at the death of said decedent, and is adequate under such law to exercise the power of appointment contained in said trust indenture in any event where the power is granted or reserved by said decedent in said indenture.

11. Plaintiffs aver that the assets of said trust of March 26, 1928 should not properly and legally have been included in the taxable estate of said decedent and that had they not been included the tax would have been $57,244.14 with interest of $255.18, or a total of $57,499.32 and not the total of $70,942.22 actually paid.

12. Plaintiffs aver that the correct estate tax upon the estate of said decedent was $57,499.32 and that there has been an overpayment of estate taxes upon the estate of said decedent of $12,696.78 by reason of the erroneous inclusion in the taxable assets of said estate of the assets of said trust of March 26, 1938 at a valuation of $84,433.49

and an overpayment of interest of $746.12, or a total overpayment of $13,442.90.

13. On November 22, 1939 the Fidelity-Philadelphia Trust Company, Executor of the Estate of Anna C. Stinson, on behalf of said estate filed with the Collector of Internal Revenue at Philadelphia upon Form 843 a claim for refund inter alia of said sum of $13,442.90. A copy thereof is hereto attached, made a part hereof and marked "Exhibit C".

14. An Internal Revenue Agent at Philadelphia has approved the contention made in this complaint and recommended allowance of said claim for refund to the extent of $12,696.78, the principal of said tax which by law carries a refund of interest thereon. A copy of such recommendation is hereto attached, made a part hereof and marked "Exhibit D".

15. Notwithstanding the recommendation aforesaid, no action has ever been taken on said claim for refund, and the same has never been either allowed or rejected, nor has the Commissioner of Internal Revenue ever sent any registered letter either allowing or rejecting said claim in any respect, notwithstanding more than six months has elapsed since the filing thereof.

Wherefore, plaintiffs demand judgment against the defendant in the sum of $13,442.90 with interest from December 24, 1936, according to law.

C. Russell Phillips,
Attorney for Plaintiffs.

EXHIBIT A.

I, ANNA C. STINSON, widow of Robert M. Stinson, of Bryn Mawr, Montgomery County, and State of Pennsylvania, make this my last Will and Testament, and revoke all other wills at any time heretofore made by me.

FIRST: I direct my Executors hereinafter named to pay my just debts and funeral expenses as soon as convenient after my decease.

SECOND: All my furniture, books, pictures, jewelry, silver, and generally all articles of personal and household use and ornament, I give and bequeath as provided in a separate memorandum, which will be found with this my will, except that all necessary furnishings of my residence in Bryn Mawr shall remain in the house during the minority of my daughters, as hereinafter provided. Any articles not so disposed of by the said memorandum shall fall into my residuary estate.

THIRD: I direct that during the minority of my two daughters, and until the youngest attains the age of twenty-one years, my residence, on Morris and Yarrow Avenues, Bryn Mawr, Pennsylvania, shall be maintained as a home for them, or either of them. The necessary furnishings of the home to remain therein during said period. The entire cost of maintenance, including, housekeepers' and servants' wages supplies of all kinds, and the general upkeep, to be charged against the general income from my residuary estate, even though one of my daughters should remove therefrom during the said period. After both of my daughters shall have attained the age of twenty-one (21) years, my said residence shall form a part of my residuary estate, and payments from the income of my estate for its maintenance shall cease. If one of my daughters should continue to reside there, after both are over the age of twenty-one years, a suitable rental shall be

charged her, so that the benefits of my estate shall accrue to my said daughters equally. If neither of them desires to reside therein, and both, or the survivor of them, shall notify my trustees to that effect, in writing, I authorize my Trustees, in their discretion to sell the said property, under the authority hereinafter given to sell real estate.

FOURTH: All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die seised and possessed, or which I may have in expectancy or remainder, or over which I may have power of disposition by Will, hereby expressly exercising any such power in me vested, I give, bequeath and devise to my Executors hereinafter named, In Trust, nevertheless, to take, hold, manage and control, and to invest and keep invested, and the net income therefrom to pay at quarterly, or other convenient periods, to my daughters, Florence V. Stinson and Nancy C. Stinson, in equal shares, for and during their respective lives, subject, however, to this provision, that upon the attainment of the age of thirty (30) years by the oldest of my said daughters, or upon my decease, if she is then over that age, my Trustees shall pay to each of my said daughters the sum of Twenty-five thousand (25,000) dollars, absolutely, out of the share of principal producing her share of income, and her share of income shall be reduced to the extent of the amount of income said principal sum would have earned if it had continued as a part of the trust fund. In the event of the death of either of my daughters before the time fixed for the payment of the said legacy of Twenty-five thousand (25,000) dollars to her, the said sum shall remain as a part of the Trust created for her, with remainders over as herein declared.

IN TRUST, after the decease of either of my said daughters, to pay her share of the said net income to her children living at the time fixed for each quarterly distribution of income, after the decease of my said daughter,

or after my decease, if she predeceases me, and the issue living at each said quarterly period of any of my said daughter's children then deceased, until the death of my last surviving daughter, after which the corpus or principal of my residuary estate shall be distributed as hereinafter directed. In the event that either of my daughters dies leaving no descendants who shall live to share in the distribution of the income, as aforesaid, then the share of income of my daughter so dying shall fall into the share of income of my other daughter, with like remainders over, as herein provided with reference to her original share, until the time hereinafter fixed for the distribution of principal to take place;

In Trust, after the decease of the last survivor of my said two daughters, my Trustees shall assign, transfer and pay over the share of the corpus or principal producing, or which would have produced the share of income of my daughter Florence V. Stinson, to her children then living and the issue then living of any of her children then deceased, per stirpes, absolutely and in fee simple; and the share of corpus or principal of my said residuary estate which produced, or would have produced, the share of income of my daughter Nancy C. Stinson, to her children then living and the issue then living of any of her children then deceased, per stirpes, absolutely and in fee simple;

In Trust, if either of my said daughters leaves no descendants to survive to the time hereinabove provided for the distribution of principal to take place, then the entire principal of my said residuary estate shall be assigned, transferred and paid over to the children then living of my other daughter, and the issue then living of any of her children then deceased, per stirpes, absolutely and in fee simple;

In Trust, in the event that at the time of the decease

of the last survivor of my said two daughters there shall be no descendants of either of my daughters then living, then my said residuary estate shall continue in the hands of my Trustees, in Trust, and the net income therefrom shall be paid in equal shares to my brothers and sisters, James C. Workman, Mary W. Lincoln, Adelaide W. Denny and Robert A. Workman, for and during their respective lives, and upon the decease of each, or upon my decease, in the case of any of them who may predecease me, to assign, transfer and pay over the share of corpus or principal producing, or which would have produced the share of income of my brother or sister so dying, in equal shares, to The Presbyterian Hospital in Philadelphia, The Contributors to the Pennsylvania Hospital, The Philadelphia Home for Incurables and The Board of National Missions of the Presbyterian Church of the United States of America, for the general purposes of the said organizations, and to be known as "The Robert M. Stinson Memorial."

FIFTH: The share of income of my daughters, if they are minors at the time of my death, shall be applied by my Trustees towards their maintenance, education and support; the receipt of a duly appointed guardian or of such person as shall be selected by my Trustees to care for my daughters, shall be a sufficient acquittance to my said Trustees for payments so made.

The share of principal to which any minor shall be entitled hereunder, after the decease of my last surviving daughter, shall be held by my Trustees during minority, and the income therefrom shall be applied towards such minor's maintenance, education and support, the receipt of a parent, or duly appointed guardian, to be a sufficient acquittance to my Trustees for payments so made.

SIXTH: All principal and income of my Estate, while in the hands of my Executors and Trustees, so far as permitted by law, shall be free from the engagements, aliena-

tions and anticipations of legatees and beneficiaries, and from attachment, execution or sequestration, by any process, legal or equitable.

SEVENTH: All inheritance, federal estate and successi taxes shall be paid from the corpus of my residuary estate, so that all gifts of chattels and life estates hereunder shall be delivered, paid over and enjoyed without deduction for any such taxes.

EIGHTH: My Executors, during the settlement of my estate and my Trustees thereafter, in addition to the authority given them by law, shall have and exercise the following powers, viz:

(a) Power to retain any investments that I may leave, so long as they deem it advisable to do so, and to invest and reinvest, and such investments, as well as any that I may leave, to alter, vary and change at discretion; but I direct that in making investments and reinvestments of any funds which may become uninvested in my estate, my Trustees shall invest and reinvest in first mortgages on real estate in Philadelphia, or its vicinity, until at least fifty (50) per cent of the aggregate of the funds of my Estate and the funds of the Trust under my Deed, dated March 26, 1928, of which the Fidelity-Philadelphia Trust Company is Trustee, taken together, considering the two funds together for purposes of computation only, shall be so invested, after which said proportion, invested in such mortgages, shall be maintained. In the investment or reinvestment of the remaining portion of the funds of my Estate, which may become uninvested, however, my Trustees shall not be confined to what are known as legal investments, but I directed that no investments shall be made in common stocks.

(b) Power to exercise any option arising by reason of the ownership of any securities; to join in any plan of

reorganization, consolidation or merger, and to deposit securities thereunder, as well as under the terms of any voting trust agreement, and to otherwise delegate their discretionary powers as occasion shall arise and they shall deem it expedient to do so.

(c) Power to let and demise, alter and improve, partition and divide, and to sell, exchange and dispose of all real estate that may form part of my estate, selling at either public or private sale, for all cash, or part cash and part mortgage, or upon the reservation of ground rents, and the said ground rents, in turn to extinguish or assign, and good and sufficient title to the property so sold to make free and discharged of all trusts and without responsibility on the part of the purchasers to see to the application of the purchase money.

(d) In the event that at the time of my decease I own stock and/or voting trust certificates calling for stock of the Cincinnati, Hamilton and Dayton Corporation (which owns a controlling interest in the railway property now known as Cincinnati and Lake Erie Railroad Company) no sale shall be made of the said stock by my Executors and Trustees, or other action taken with reference to it, except with the approval of Dr. Thomas Conway, Jr. during his life. After his decease, my Executors and Trustees shall act with reference to the said stock as in their discretion they shall deem wise.

NINTH: I appoint my brother, Robert A. Workman, Guardian of my daughters, in the event that they, or either of them, are minors at the time of my decease. Should he predecease me, or die during my daughters' minority, I appoint my sister, Adelaide W. Denny, their Guardian.

TENTH: I nominate and appoint my brother, Robert A. Workman, and the Fidelity-Philadelphia Trust Company, Executors of this my Will. Should my said brother

predecease me, or die during the existence of any of the trusts hereunder, I nominate and appoint Dr. Thomas Conway as Co-Executor, and Co-Trustee, to act with the said Trust Company, and I expressly relieve my Executors of the necessity for entering security in any jurisdiction in which they may be called upon to act.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of June A. D. 1930.

ANNA C. STINSON (LS)

Signed, sealed, published and declared by the above named ANNA C. STINSON, as and for her last Will and Testament, in the presence of us, who at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses:

A. E. Schmitz 135 S. Broad Street Phila., Pa.
E. Q. Holden " " " " " "

(Schedule of distribution of personal items not printed.)

EXHIBIT B.

THIS INDENTURE made in duplicate this 26th day of March A. D. 1928, between ANNA CHENEY STINSON, hereinafter called the Settlor, and the FIDELITY-PHILADELPHIA TRUST COMPANY, hereinafter called the Trustee, WITNESSETH:

THAT the said Settlor, for and in consideration of the trusts hereby assumed by the said Trustee as well as the sum of One Dollar lawful money to her in hand paid, the receipt whereof is hereby acknowledged, hath bargained, sold, assigned, transferred and set over and by these presents doth hereby bargain, sell, assign, transfer and set over unto the said Fidelity-Philadelphia Trust Company, its successors and assigns, all the securities, investments,

moneys, and other property set forth in the Schedule hereto annexed and made part hereof, designated as "Schedule A", and all her right, title, interest, property claim and demand of, in, and to the said property and every part thereof;

To Have and to Hold, receive and take the securities, investments, moneys, and other property hereby assigned or mentioned and intended so to be, together with any additional sum of money, securities or other property which may be transferred by the said Settlor to be held under the terms hereof, unto it, the said Fidelity-Philadelphia Trust Company, its successors and assigns, to and for its and their only proper use, benefit and behoof forever, subject, nevertheless, as to any Indenture of Mortgage which may at any time form part of the within created trust estate to the equity of redemption of the respective mortgagors therein.

In Trust, Nevertheless, to and for the following uses, intends and purposes;

In Trust to take, hold, manage and control and to invest and keep invested and the net income therefrom to pay at quarterly or other convenient periods to the said Settlor for and during all the term of her natural life, and at her death.

In Trust to pay the said net income, in equal shares, to Florence V. Stinson and Nancy C. Stinson, daughters of the said Settlor, during their respective lives.

In Trust, at the death of each daughter of said Settlor, to pay over the corpus or principal supporting such daughter's share of income to her then living descendants, per stirpes, absolutely.

In Trust, in the event of the decease of either daugh-

ter of said Settlor without leaving descendants surviving, to add the corpus or principal of such daughter's share to the share of the other daughter of said Settlor, if then living or to the then surviving descendants, per stirpes, of such other daughter if then dead, such descendants to take their deceased ancestor's share by representation; the share so accruing to a surviving daughter of said Settlor to be held upon the same trusts as her original share.

In Trust, in the event of the death of both daughters of said Settlor without leaving descendants surviving, to pay over the corpus or principal of the within created trust estate to such person or persons and upon such estate or estates as the said Settlor shall by her last Will and Testament direct, limit and appoint, and in default of such appointment then to assign, transfer and pay over the said corpus or principal of the within created trust estate to the Presbyterian Home for Aged Couples and Aged Men of the State of Pennsylvania, at Bala, Pennsylvania; the Presbyterian Orphanage in the State of Pennsylvania now located at Chester Avenue and Fifty-eighth Street in the City of Philadelphia; the Presbyterian Hospital now located at Thirty-ninth and Filbert Streets, Philadelphia; the Bryn Mawr College at Bryn Mawr, Pennsylvania, and the Philadelphia Home for Incurables now located at Forty-eighth Street and Woodland Avenue, Philadelphia, in equal shares absolutely.

The share of income to which the Settlor's children may be entitled hereunder during their minority shall be applied by said Trustee in its sole discretion toward their maintenance, education and support during such minority and the receipt of a duly appointed guardian of their persons shall be a proper acquittance to the said Trustee for income so paid and applied.

The share of principal to which any minor may be entitled hereunder, upon the termination of the trusts or any of them created hereby, shall be held by the said

Trustee during minority and the income therefrom shall be applied in the sole discretion of said Trustee, towards such minor's maintenance, education and support, the receipt of a parent or duly appointed guardian of the person to be a sufficient acquittance to the said Trustee for payments so made and upon the attainment of the age of twenty-one (21) years by any of the said minors, his or her share of the said principal shall be transferred, assigned and paid over. In the event of the decease of any of them before attaining the age of twenty-one years, his or her share of the said principal shall be transferred, assigned and paid over to the legal representative of said minor's estate.

The corpus or principal of the property hereby transferred and the income therefrom while in the hands of the said Trustee, to the fullest extent permitted by law, shall be free from the control, debts, liabilities and engagements of beneficiaries hereunder and shall not be subject to anticipation or assignment by them nor to execution or process, legal or equitable, for the enforcement of judgments or claims of any sort against them.

All inheritance, federal estate and succession taxes, if any shall be found to be payable, shall be paid from the corpus or principal of the trust estate, so that all life estates hereunder shall be paid over and enjoyed without deduction for any such taxes.

The said Trustee, in addition to any authority given it by law, shall have and exercise the following powers:

(a) Power to retain any investment which may at any time be assigned by the Settlor to the Trustee so long as it may deem it advisable to do so, and to invest and reinvest and investments so made, as well as any that may be assigned, to alter, vary and change at discretion, confining themselves, however, to securities sanctioned by law for investment by trustees, preference to be given to first mortgages on real estate in the State of Pennsylvania.

(b) Power to exercise any option arising by reason of the ownership of securities; to join in any plan of reorganization, consolidation or merger, and to deposit securities thereunder, as well as under the terms of any voting trust agreement and generally to delegate its discretionary powers as occasion shall arise and it shall deem it expedient to do so.

(c) Power to let and demise, alter and improve, partition and divide, and to sell, exchange and dispose of any real estate which may at any time form part of the within created trust estate, selling at either public or private sale for all cash or part cash and part mortgage or upon the reservation of ground rents and the said ground rents in turn to extinguish or assign and good and sufficient title to the property so sold to make free and discharged of all trusts and without responsibility on the part of purchasers to see to the application of the purchase money.

(d) Power to make all reasonable and necessary compromises.

(e) Power to apply income herein given to beneficiaries towards their maintenance and support should they for any reason through illness, accident or otherwise become mentally or physically unable to administer their own affairs or to receive and disburse the moneys payable to them hereunder.

It Is Hereby Declared by the said Settlor that she has been fully advised as to the legal effect of the execution of this Indenture and informed as to the character and amount of the property hereby transferred and conveyed; and, further, that she has given consideration to the question whether the settlement herein contained shall be revocable or irrevocable, and she hereby declares it to be irrevocable, and that it shall stand without power in her, the said Settlor, at any time to revoke, change or annul any of the provisions herein contained.

In Witness Whereof the said Settlor hath hereunto set her hand and seal the day and year first above written.

Anna Cheney Stinson (Seal)

Sealed and delivered
in the presence of

S. L. Gamble
A. E. Schmitz

We hereby accept the within created Trust.

Fidelity-Philadelphia Trust Company,
By: N. C. Denney
Vice-President
(Seal)

Attest:

H. L. McCloy
Secretary

(Schedule of assets omitted.)

EXHIBIT C.

Form 843
Treasury Department
Internal Revenue Service
Revised June, 1930

CLAIM

To be Filed with the Collector where Assessment was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Collector's Stamp
(Date received)

Refund of Tax Illegally Collected.
Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate or income taxes).

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

Type or Print

Name of taxpayer or purchaser of stamps—Estate of Anna C. Stinson, dec'd. c/o Fidelity-Philadelphia Trust Company, one of the executors

Business address—135 S. Broad Street, Philadelphia, Pa.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—1st District of Pennsylvania
2. Period (if for income tax, make separate form for each taxable year) from , 19 , to , 19
3. Character of assessment or tax—Estate Tax
4. Amount of assessment, $70,942.22; dates of payment—9/5/35 $53,386.59; 12/24/36 $17,555.63
5. Date stamps were purchased from the Government—
6. Amount to be refunded—$17,555.63 and interest from 12/24/36 $
7. Amount to be abated (not applicable to income or estate taxes)— $
8. The time within which this claim may be legally filed expires, under Section 319 (b) of the Revenue Act of 1926, on December 24, 1939.

The deponent verily believes that this claim should be allowed for the following reasons:
See attached sheets (part thereof relating to other matters not printed)

FIDELITY-PHILADELPHIA TRUST COMPANY,

(Attach letter size sheets if space is not sufficient)
Signed By: H. C. Haines,
Asst. Secy.

Sworn to and subscribed before me this 15th day of November, 1939.

N. S. AITKEN,

(Signature of officer administering oath,
Notary Public 2/19/41
(Title)
(See Instructions on Reverse Side)

Treasury Department
Washington
Oct. 29, 1936

MT-ET-CI-10888-1st Pennsylvania
Estate of Anna C. Stinson
Date of death—November 17, 1934
Fidelity-Philadelphia Trust Company, et al, Executors,
135 S. Broad Street,
Philadelphia, Pa.

Sirs:

A deficiency of $32,078.16 in the Federal estate tax liability of the above named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency

and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308(a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890 has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING,
Commissioner

By: D. S. BLISS,
Deputy Commissioner

Enclosures:

Statement,
Waiver, Form 890.
MT-ET-CI-10888-1st Pennsylvania
Estate of Anna C. Stinson
Date of death—November 17, 1934.

STATEMENT

The estate's protest is directed against the following:

GROSS ESTATE

Stocks and Bonds	*Returned*	*Tentatively Determined*	*Determined*
Item 38	$9,300.00	$9,387.50	$9,300.00

After further consideration of the valuation of the foregoing item, adjustment to the returned value is deemed warranted.

Insurance

Proceeds under annuity contracts with the Equitable Life Assurance Society of the United States	0.00	25,703.63	0.00

The matter referred to in the protest under this heading has been transferred to Schedule E for consideration.

Transfers

Proceeds under annuity contracts with the Equitable Life Assurance Society of United States (transferred from Schedule C-2)	0.00	0.00	25,703.63

It appears that at the date of her death the decedent owned three annuity contracts with the Equitable Life Assurance Society of United States. The annuity under said contracts was to be paid to the decedent during her lifetime and upon her death any refund was to be paid to her daughters. Under the facts it does not appear that the annuity contracts come within the classification of life insurance. The contracts, therefore, are not governed by any rules applicable to life insurance. In the opinion of this office the contracts represent a transfer of property by the decedent in contemplation of and intended to take effect in possession and enjoyment at or after her death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended. Consequently, the proceeds of the said annuity contracts as of the date of the decedent's death are deemed properly includible for estate tax under Schedule E.

Net value of property held by the Fidelity-Philadelphia Trust Company under trust agreement dated March 26, 1928	0.00	84,433.49	84,433.49

An examination of the trust agreement executed on March 26, 1928 discloses that the decedent retained therein the right to the income for life and the right to designate the person or persons who shall possess or enjoy the corpus of the trust in the event of the decedent's daughters die without leaving descendants surviving. Accordingly, the net value of the property comprising the trust is included in the gross estate in accordance with the provisions of Section 302(c) of the Revenue Act of 1926, as amended by Section 803 of the Revenue Act of 1932.

Other Miscellaneous Property	*Returned*	*Tentatively Determined*	*Determined*
Item 8	$1,600.00	$2,200.00	$1,600.00

The inclusion of the Lincoln sedan limousine at the sale price is deemed warranted, and adjustment is made accordingly.

In view of the foregoing the following computation shows the Federal estate tax liability of this estate which is hereby made final:

Gross estate		$662,527.21
Deductions (1926 Act)		125,587.75
Net estate (1926 Act)		538,939.46
Net estate (1934 Act)		558,939.46
Gross tax (1926 Act)		19,446.97
Credit for estate or inheritance tax		0.00
Net tax (1926 Act)		19,446.97
Total gross taxes (1926 & 1934 Acts)		85,498.50
Gross tax (1926 Act)		19,446.97
Additional tax		66,051.53
Net tax (1926 Act)		19,446.97
Total net tax		85,498.50
Net tax shown on the return	$53,386.59	
Amount assessed as deficiency pursuant to waiver	33.75	
		53,420.34
Deficiency		$32,078.16

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter, if a petition is not filed with the Board of Tax Appeals, $16,520.58 of the deficiency will be assessed. As the balance of the deficicency may be eliminated by credit for State or Territorial estate, inheritance, legacy or succession taxes, opportunity will be

accorded for the submission of the evidence required by Article 9 or Estate Tax Regulations 80. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six per cent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

EXHIBIT D.

Treasury Department
Internal Revenue Service
Philadelphia, Pa.

Office of
Internal Revenue Agent in Charge
Room 1200 Gimbel Building
Philadelphia Division February 23, 1940
MT-ET-10888
Estate of Anna C. Stinson
Date of Death—November 17, 1934
First District of Pennsylvania
Mr. H. C. Haines,
Assistant Secretary,
Fidelity-Philadelphia Trust Company,
135 S. Broad Street,
Philadelphia, Pa.

Dear Mr. Haines:

In connection with the Claim for Refund filed in the above-entitled estate, I shall recommend that the interest received of $211.70 on the annuity contracts be eliminated from the Gross Estate, as well as the value of the property transferred in trust on March 26, 1928.

The above recommendations result in an Overassessment of $12,696.78, computed as follows:

Gross Estate—as per Bureau Letter dated 10/29/36			662,527.21
Less: Recommended Adjustment—Schedule C-2		211.70	
" " " E		84,433.49	84,645.19
Gross Estate—			577,882.02
Deductions—1926 Act			123,587.75
Net Estate—1926 Act			454,294.27
Net Estate—1934 Act			504,294.27
Gross Tax—1926 Act			15,214.71
Credit for Estate and Inheritance Taxes			12,171.77
Net Tax—1926 Act			3,042.94
Total Gross Taxes—1926 and 1934 Acts			69,415.91
Gross Tax—1926 Act			15,214.71
Net Additional Tax—1934 Act			54,201.20
Total Net Tax			57,244.14
Returned Tax		53,386.59	
Amount assessed as deficiency pursuant to waivers	33.75		
	16,520.58	16,554.33	69,940.92
Overassessment			12,696.78

The enclosed Acceptance should be properly executed and promptly returned.

Very truly yours,

JAMES J. CLORAN
Internal Revenue Agent.

JJC:M
Encl.

3. ANSWER.

Now comes the defendant, Walter J. Rothensies, individually and as Collector of Internal Revenue for the First District of Pennsylvania, by Gerald A. Gleeson, United States Attorney, and for answer to the plaintiffs' complaint filed herein specifically denies each and every allegation of fact alleged in said complaint which is not admitted, qualified or denied in this answer, and, for further answer to the said complaint the defendant says:

1. Defendant admits the allegations of fact contained in paragraphs 1, 3, 4, 5, 6, 7, 8 and 13 of the said complaint.

2. Defendant admits the allegations of fact contained in paragraph 2 of the said complaint, except that the defendant denies that the estate taxes referred to in said paragraph were "erroneously" paid to the defendant, and further answering said paragraph, the defendant says that all of the estate taxes referred to in said paragraph 2 were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant.

3. Answering paragraph 9 of the said complaint, the defendant admits that the organizations and institutions therein mentioned were in existence upon the date of the decedent's death, and still are in existence, and have capacity to take and receive gifts and bequests. Further answering said paragraph 9, the defendant says that all other statements therein contained are conclusions of law as to which the defendant is not required to make reply in this answer, and that to the extent that any or all of such other statements are or may be considered to be allegations of fact they are denied.

4. Answering paragraph 10 of the said complaint, the defendant says that the statements therein contained are conclusions of law as to which the defendant is not required to make reply in this answer.

5. Answering paragraph 11 of the said complaint, the defendant says that the statements therein contained are conclusions of law as to which the defendant is not required to make reply in this answer, and that to the extent that any or all of said statements are or may be considered to be allegations of fact they are denied.

6. Answering paragraph 12 of the said complaint, the defendant says that the statements therein contained are conclusions of law as to which the defendant is not required to make reply in this answer, and that to the extent that any or all of said statements are or may be considered allegations of fact they are denied.

7. Defendant asks that paragraph 14 of the said complaint be stricken therefrom as being wholly irrelevant and immaterial to any issue tendered by the complaint, and prejudicial to the rights of the defendant; that the facts alleged in said paragraph 14, if true, should not and cannot properly be considered in determining any issue tendered by the said complaint; that no evidence proving or tending to prove the facts alleged in said paragraph 14 would be admissible upon the trial of any issue tendered by the said complaint, and, therefore, the allegations in said paragraph 14 are improper and should be expunged from the said complaint.

8. The allegations of fact contained in paragraph 15 of the said complaint are denied. Further answering said paragraph 15, the defendant says that the claim for refund which was filed by the plaintiffs on or about November 22, 1939, contended that a refund of estate taxes in the sum of $17,555.63 was due the plaintiffs on three different

grounds, one of which is the ground upon which recovery is sought in the present action and another of which was that the Commissioner of Internal Revenue had included in the value of the taxable estate the sum of $211.70 representing certain interest received by the beneficiaries of the estate which interest should not have been included therein; that after consideration of the claim for refund the Commissioner allowed the plaintiffs' contention relative to the interest item aforesaid but denied its other two contentions, including the contention now made in the present action; that, thereafter, on May 3, 1941, a certificate of overassessment in the amount of $33.68 was issued to the plaintiffs as a result of the allowance of their contention relative to the interest item, as aforesaid, and this amount, together with $8.93 interest thereon, was refunded to the plaintiffs; that, in a letter dated May 3, 1941, the Commissioner advised the plaintiffs that their claim for refund aforesaid was rejected except to the extent and in the amount allowed as an overassessment of tax in the certificate of overassessment above mentioned.

9. Further answering the said complaint, and as a separate defense to the alleged cause of action therein stated, the defendant says that the transfers of property by the plaintiffs' decedent on March 26, 1928 and May 31, 1928, mentioned in paragraph 5 of the said complaint, to the trust created by the plaintiffs' decedent by deed dated March 26, 1928, were transfers in trust intended to take effect in possession or enjoyment at or after the plaintiffs' decedent's death.

10. Further answering said complaint, and as a separate defense to the alleged cause of action therein stated, the defendant says that the transfers of property by the plaintiffs' decedent on March 26, 1928, and May 31, 1928, mentioned in paragraph 5 of the said complaint, to the trust created by the plaintiffs' decedent by deed dated

March 26, 1928, were transfers made in contemplation of death within the meaning of the Internal Revenue statutes.

Wherefore, the defendant asks that the plaintiffs' complaint be dismissed and that the defendant be allowed his costs herein.

THOMAS J. CURTIN,
Assistant United States Attorney
GERALD A. GLEESON,
United States Attorney.

4. STIPULATION OF AGREED FACTS.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys of record, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the rights of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true.

I.

Anna C. Stinson died November 17, 1934, a resident of Bryn Mawr, Pennsylvania. On September 5, 1935, the executors of her estate filed a Federal estate tax return showing a gross estate of $552,165.09, claiming deductions (exclusive of the specific exemption of $100,000 under the

Revenue Act of 1926, and of $50,000 under the Revenue Act of 1932, as amended) in the amount of $23,587.75 resulting in a net estate of $428,577.34 for tax imposed by the Revenue Act of 1926, and a net estate of $478,577.34 for tax imposed by the Revenue Act of 1932, as amended, and a total net tax of $53,386.59 after claiming a credit of $11,143.10 on account of state inheritance taxes. The returned tax of $53,386.59 was paid by the executors on September 5, 1935.

II.

Subsequently, a tentative audit and review of this return was made by the Commissioner of Internal Revenue, the result of which was set forth in a letter directed to the executors under date of September 1, 1936. In this tentative audit the gross estate was determined to be $663,214.71. Deductions (exclusive of the specific exemption) were allowed in the sum of $23,587.75 (as reported in the estate tax return), resulting in a net estate of $539,626.96 for tax imposed by the Revenue Act of 1926 and a net estate of $589,626.96 for tax imposed by the Revenue Act of 1932, as amended, and a total net tax of $85,629.12. No credit for state inheritance taxes was allowed in this tentative audit. Inasmuch as a tax of $53,386.59 was paid on the basis of the estate tax return, the deficiency in tax was tentatively determined to be $32,242.53.

III.

A protest was filed by the executors against the tentative findings of the Commissioner, and, after giving consideration to the contentions advanced by the representatives of the estate, a final audit was made by the Commissioner, the result of which was set forth in a letter directed to the executors under date of October 29, 1936. In this final audit, the gross estate was determined to be $662,527.21. Deductions (exclusive of the specific exemption) were allowed in the sum of $23,587.75 (as reported

in the estate tax return), resulting in a net estate of $538,939.46 for tax imposed by the Revenue Act of 1926, and a net estate of $588,939.46 for tax imposed by the Revenue Act of 1932, as amended, and a total net tax of $85,498.50. No credit for state inheritance taxes was allowed in this final audit. Since a tax of $53,386.59 was paid on the basis of the estate tax return, and a tax of $33.75 was assessed pursuant to a waiver filed by the executors, making a total payment of $53,420.34, the deficiency in tax was finally determined to be $32,078.16.

IV.

Subsequent to the mailing of the final audit letter of October 29, 1936, the executors submitted evidence entitling the estate to a credit of $15,557.58 on account of state inheritance tax payments. This credit of $15,557.58 was allowed by the Commissioner, as shown by letter directed to the executors under date of December 7, 1936. The allowance of this credit reduced the amount of the deficiency assessment of tax from $32,078.16 to $16,520.58. This deficiency tax of $16,520.58, plus interest thereon in the amount of $999.38, making a total of $17,519.96 was paid by the executors on December 24, 1936. The sum of $33.75, plus interest in the amount of $1.92, or a total of $35.67 paid pursuant to a waiver was paid by the executors on the same date.

V.

On November 24, 1939, the executors filed a claim for refund of $17,555.63, the claim being based upon the following contentions:—

(1) That the Commissioner of Internal Revenue erroneously included as part of this decedent's statutory gross estate the value of the corpus of a trust created by the decedent on March 26, 1928.

(2) That the Commissioner erroneously included

as part of the decedent's statutory gross estate the amount of the proceeds of certain annuity policies; and

(3) That even if the proceeds of these policies are taxable the interest received by the beneficiaries on the amount due from the date of the decedent's death to the date of payment in the amount of $211.70 should not be included in the taxable estate.

VI.

In acting on the claim for refund, the Commissioner excluded from the decedent's statutory gross estate the interest amounting to $211.70, this being the third contention made under the claim for refund. The Commissioner, however, denied the other contentions made by the executors. Under date of May 3, 1941, the Commissioner issued a certificate of overassessment showing an overpayment of $33.68, resulting from the exclusion of the interest item of $211.70. This overpayment of $33.68, plus interest thereon in the sum of $8.93 was refunded to the executors, and the Commissioner advised the executors that as to the balance claimed the claim for refund was disallowed.

VII.

On March 26, 1928, the decedent executed a deed of trust transferring certain property to the Fidelity-Philadelphia Trust Company as trustee to be held and administered as provided by the terms of the trust indenture. A copy of the trust indenture is attached to the plaintiffs' complaint as "Exhibit B". The value of the corpus of this trust as of the date of the decedent's death was $84,433.39. This trust was disclosed by the executors under "Schedule E Transfers" of the estate tax return, but the value of the corpus was not included for tax.

VIII.

On November 17, 1934, the date on which the decedent died, she was survived by two living daughters (who were unmarried at the time of decedent's death), whose names are now Florence Valleau Whitridge and Nancy Chaney Day. Her daughter Florence Valleau Whitridge was born February 22, 1916, and her daughter Nancy Chaney Day was born December 9, 1917.

According to the mortality tables customarily used the value on the date of decedent's death of a remainder after the death of the survivor of two persons of the age of decedent's two daughters was $0.14030 for each $1 principal value on that date, which, applied to the $84,433.49 value of principal in the trust would give $11,846.02 as the value of a remainder interest therein on the date of decedent's death, after the death of the survivor of her two daughters.

IX.

The Presbyterian Hospital in Philadelphia, The Contributors to the Pennsylvania Hospital, The Philadelphia Home for Incurables, and The Board of National Missions of the Presbyterian Church of the United States of America, named in the residuary clause of the will of Anna C. Stinson, copy of which will is attached to plaintiffs' complaint as "Exhibit A", are and, at the date of the decedent's death, were corporations organized and operated exclusively for religious, charitable or scientific purposes within the meaning of Section 303 of the Revenue Act of 1926 as amended by the Revenue Act of 1934, and the Regulations promulgated thereunder as the Act and Regulations stood on the date of the decedent's death, and no part of the net earnings of any of them inures to the benefit of any private stockholder or individual and no part of the activities of any of them is carrying on propaganda or otherwise attempting to influence legislation, and in addition, The Presbyterian Home for Aged Couples and

Aged Men of the State of Pennsylvania, The Presbyterian Orphanage in the State of Pennsylvania and Bryn Mawr College, mentioned in the trust indenture of March 26, 1928, Exhibit B of the complaint, are and, at the time of the decedent's death, were corporations organized and operated exclusively for religious, charitable, scientific or educational purposes, within the meaning of Section 303 of the Revenue Act of 1926 as amended by the Revenue Act of 1934 and the Regulations promulgated thereunder as the Act and Regulations stood on the date of the decedent's death, and no part of the net earnings of any of them inures to the benefit of any private stockholder or individual and no part of the activities of any of them is carrying on propaganda or otherwise attempting to influence legislation.

C. RUSSELL PHILLIPS,
Attorney for the Plaintiffs.
GERALD A. GLEESON,
THOMAS J. CURTIN,
Attorneys for Defendant.

5. TRANSCRIPT OF THE TRIAL RECORD.

THE COURT: All right, gentlemen.

Are there any pleadings that can be admitted under the answer?

MR. PHILLIPS: Yes, sir, we have stipulated a great many of the facts, but on the chance that it may be helpful to Your Honor I have prepared a little trial brief (producing same).

THE COURT: Yes, it would be helpful.

MR. PHILLIPS: This is an action to recover a Federal estate tax which was paid on the estate of Anna C. Stinson, who died November 17, 1934.

On March 26, 1928, she created a trust, and put into the same securities which on the day of her death were worth $84,000—I have the exact figures in the stipulation—and these securities, or rather, the principal of the trust was not included in her estate tax returned, but a note of the facts was made on the return, and the Government contends that the principal of the trust should be included in gross estate for estate tax purposes. That was done, and the tax paid, and this suit was brought to recover the tax.

There are two reasons given for that contention; the Government contends that the trust was made in contemplation of death—

THE COURT: How many months before death was the trust created?

MR. PHILLIPS: It was six and a half years.

THE COURT: She died in 1934?

MR. PHILLIPS: November 17, 1934. She was forty-five when she made the trust, and fifty-one when she died.

The other reason that the Government cites in this let-

ter to us is that the trust reserves a remainder to this woman's estate, and that under the Hallock decision the Government contends it is taxable. That makes it important to look at the terms of the trust. While it is a long trust, its terms are clear.

(Opening statements of counsel to the Court.)

MR. PHILLIPS: If Your Honor please, both sides have agreed on many of the facts here in a stipulation, which I offer in evidence. (Producing same.)

THE COURT: It may be received.

(Stipulation of Agreed Facts referred to was received in evidence and is filed with these proceedings.)

MR. PHILLIPS: Now, there are a number of admissions which are covered by the pleadings. There are a number of formal admissions.

Paragraph 1 of the complaint, I offer in evidence, it is simply the identification of the parties, and I do not think I need to read it to the stenographer.

MR. COOPER: Those are all the paragraphs that have been admitted?

MR. PHILLIPS: Yes.

(Paragraph 1 of the Complaint reads as follows:

"1. Fidelity-Philadelphia Trust Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania having a place of business at 135 S. Broad Street, Philadelphia. Robert A. Workman is a citizen of the United States residing at 426 Montgomery Avenue, Haverford, Pennsylvania.").

MR. PHILLIPS: I offer in evidence paragraph 2 of the complaint except that portion—or, rather, let me say, that the phrase "to recover estate taxes erroneously paid", the

Government denies the erroneousness of it, but admits what the action is about, and I offer in evidence paragraph 2 of the complaint except for the word "erroneously".

(Paragraph 2 of the Complaint reads as follows:

"2. The defendant, Walter J. Rothensies, at the times herein referred to was and is the Collector of Internal Revenue for the First District of Pennsylvania and resides in the Eastern Judicial District of Pennsylvania. This is a suit of a civil nature to recover estate taxes erroneously paid to the defendant and is upon a cause of action arising under the Internal Revenue Laws of the United States."

Paragraph 2 of the Answer reads as follows:

"2. Defendant admits the allegations of fact contained in paragraph 2 of the said complaint, except that the defendant denies that the estate taxes referred to in said paragraph were 'erroneously' paid to the defendant, and further answering said paragraph, the defendant says that all of the estate taxes referred to in said paragraph 2 were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant.")

Mr. Phillips: I offer in evidence paragraph 3 of the complaint which refers to the will, and I also offer in evidence the decedent's will, which is Exhibit A attached to the complaint.

(Paragraph 3 of the Complaint reads as follows:

"3. Anna C. Stinson died November 17, 1934, a citizen of the United States, residing at Morris and Yarrow Avenues, Bryn Mawr, Montgomery County, Pennsylvania, leaving a will dated June 6, 1930 which was on November 22, 1934 duly admitted to probate

by the Register of Wills of Montgomery County, Pennsylvania. A copy of said will is hereto attached, made a part hereof and marked 'Exhibit A'. On November 22, 1934 letters testamentary were granted by said Register to plaintiffs, Fidelity-Philadelphia Trust Company and Robert A. Workman, and the said plaintiffs became and are executors of the estate of said decedent.")

Mr. Phillips: I offer in evidence paragraph 4 of the complaint which refers to the trust, a copy of which is attached as Exhibit B to the complaint, and which I also offer in evidence.

(Paragraph 4 of the Complaint reads as follows:

"4. On March 26, 1928 the said decedent made, executed and delivered a certain trust indenture, a copy whereof is hereto attached, made a part hereof and marked 'Exhibit B.')

Mr. Phillips: Mr. Workman, will you take the stand, please.

Robert A. Workman, having been duly sworn was examined and testified as follows:

Direct-examination.

By Mr. Phillips:

Q. Mr. Workman, you are a brother of Mrs. Stinson, I believe?

A. Yes, sir, I am.

Q. And you knew her intimately, I suppose?

A. Very.

Q. You knew of this trust on March 26, 1928?

A. I did.

Q. Will you tell us the circumstances surrounding its creation and why it was done as far as you know.

A. Mrs. Stinson relied on my advice in matters of investment—

Q. She was a widow, I believe?

A. She was a widow.

And after investing in Government bonds, in Municipal bonds, and Federal Land Bank bonds, as a matter of diversification I advised Mrs. Stinson to create this trust. As a matter of fact, it had never occurred to her to do so unless I had brought it to her attention. I had had some experience with my mother's account, and was so pleased by the way the Trust Company handled the account that I created a deed of my own with a small trust, with the same Company; and as a matter of diversification of capital I advised her to do so.

Q. Just about how much in the way of securities was put in this trust at that time?

A. The total sum was $100,000.

Q. What proportion, approximately, of her means went into the trust?

A. At that time I should say approximately one-seventh.

Q. Was the trust added to subsequently?

A. No

MR. COOPER: I didn't get your previous answer.

THE WITNESS: Approximately one-seventh, at the time it was created.

By MR. PHILLIPS:

Q. Did she have any other trust that you know of?

A. No, sir.

Q. Now, tell us what you did after you gave this advice to her, who did you go to see, and how did you go about it?

A. I took her to the old Philadelphia Trust Company into the office of N. C. Denny, and told him that I brought Mrs. Stinson in to create a trust similar to mine.

Q. What happened,—was a draft prepared and so on?

A. He got all the notes that Mrs. Stinson had made out, and then a draft was made and a copy was sent to me at the same time that a copy was sent to Mrs. Stinson; then there were a few corrections made and the final draft was drawn.

Q. Were you present when the trust was signed and the securities turned over?

A. I was.

Q. And that occurred on the date of the instrument, I suppose?

A. That was signed and witnessed sometime in March.

Q. Do you have any reason or know of anything that would indicate that Mrs. Stinson may have made that trust in expectation or contemplation of death?

A. Absolutely no reason. It was on my advice entirely.

Q. How old was she at that time?

A. In 1928?

Q. Yes.

A. She was born in 1883,—forty-five.

Q. Was she in good health then?

A. In excellent health.

Q. Did you know her intimately and live near her and see often?

A. I lived within a mile of her residence.

Q. Do you know of any illness she had had around that time?

A. No illness

Q. Or if she had any pain?

A. No illness that I know of.

Q. Would you have likely known of it if she had?

A. I would have known had she been ill.

By The Court:

Q. With whom did she live?

A. She lived with her two daughters.

Q. She was a widow at the time?

A. She was a widow and lived with her two daughters in Bryn Mawr.

By Mr. Phillips:

Q. How did her husband die?

A. Her husband was horseback riding and was thrown from his horse in Allen Lane, and thrown on a rock and fractured his skull and died within a few hours.

Q. What about the other members of her family? She mentioned four brothers and sisters in her will,— James C. Workman, when was he born?

A. James C. Workman, March 29, 1868.

Q. Is he living now?

A. He is still living.

Q. That would make him about seventy-three, then?

A. He will be seventy-four in March, yes, sir.

Q. And Mary W. Lincoln, when was she born?

A. January 29, 1872.

Q. Is she living?

A. She is living.

Q. And Adelaide W. Denny, when was she born?

A. August 30, 1873.

Q. And yourself?

A. I was born October 7, 1877.

Q. Now, have there been any brothers or sisters who died?

A. No, sir; there were just the five of us.

Q. How old was her mother when she died?

A. Her mother was eighty-two when she died.

Q. And her father?

A. Her father was in his seventy-first year.

Q. So that the family was reasonably long lived?

A. Yes, sir.

Q. Now, the family, I think, you said consisted of the two daughters, and I suppose the servants,—they lived together in the home or residence?

A. Yes, sir.

Q. What kind of a residence was it? Was it a house and grounds, or was it a city residence?

A. It was a house with about an acre and a half or an acre and three-fourths of ground.

Q. Do you know whether she looked after the management of that place?

A. She did.

Q. Were you often at the home and in a position to observe?

A. I was there very frequently.

Q. Was she an active person socially?

A. Most active socially.

Q. Did she go away in the summer time? What did she do with her time?

A. She went to Maine nearly every summer. I say "nearly" because in 1930 they went abroad.

Q. Who went with her?

A. Her two daughters.

Q. She took them along?

A. Yes, sir.

Q. And they were how old? Tell us when they were born, if you recall.

A. Florence, the oldest girl, was born February 22, 1916.

Q. And Nancy?

A. On December 1, 1917. I think Nancy was about twelve years old then.

Q. And the other about fourteen. I suppose?

A. Yes, sir, fourteen.

Q. And she went abroad with those two children?

A. She did.

Q. In 1930?

A. Yes, sir.

Q. Did she take any servants along or any help to look after the children?

A. No, she didn't take any servants. She did take a very intimate friend with her.

Q. How long were they gone?

A. I think they were gone about three months. At least three months.

By The Court:

Q. Did she supervise or manage the household?

A. Yes, sir.

Q. She was active every day?

A. Active every day.

By Mr. Phillips:

Q. By the way, do you know of any illness of Mrs. Stinson after the creation of the trust?

A. She had no illness after the creation of the trust until the summer she died.

Q. That would be in 1934?

A. That is in 1934.

Q. What happened then, if you recall?

A. She was in Maine, and she had an attack of tonsillitis. That was in September. That is the only illness I know she had.

Q. Now, what was done about that, do you know?

A Well,—

Q. Did she have a doctor?

A. She had a physician.

Q. Who was—

A. Dr. Lincoln.

Q. Who is Dr. Lincoln?

A. Dr. Lincoln is my brother-in-law. He married my oldest sister, and it was at his cottage in Maine that she was staying at the time.

Q. That was about September of the year she died?

A. In 1934.

Q. Did she recover?

A. Yes, she recovered.

Q. How did she get back,—did she come back home?

A. Her eldest daughter had a "coming out" in the latter part of September, and she came home for that event.

Q. Do you know whether she supervised the preparation for that event?

A. Yes, she did.

Q. Would you know whether that is a picture of her on that occasion? (Producing same)

A. That is the last photograph that she had taken in the home at the time Florence came out.

Q. That was in the fall of 1934, about when?

A. I should say in the latter part of September. I do not remember the exact date.

Q. She had apparently recovered then?

A. She had.

Q. As far as you could see?

A. Yes, sir.

By The Court:

Q. When was this taken, about,—the fall of when?

A. 1934,—it was taken before the coming out of Miss Florence.

Q. And she died in November?

A. She died in November. Just two months after this coming out.

Q. Two months after?

A. Just about two months, she died on November 17, 1934.

Mr. Phillips: Cross-examine.

Cross-examination.

By Mr. Cooper:

Q. Mr. Workman, do you know how much property your sister owned at the time she made this trust?

A. I should say about $750,000, including the home in which she lived.

Q. Do you know what kind of property it was, whether it was securities, real estate, or—

A. Yes, yes. I recommended most of the securities she bought, and also was at the settlement of the house she purchased in Bryn Mawr.

Q. Was most of this $700,000 in securities?

A. It was all in securities except the home in Bryn Mawr.

Q. And the trust, you estimated at the time it was created was—

A. She paid to the Fidelity-Philadelphia Trust Company $100,000 in securities and cash.

By The Court:

Q. Roughly, would you say the securities in cash amounted to $700,000 and the real estate $50,000? I think that is what counsel is getting at. I think you said that about one-seventh of the estate was in this trust. Now, one-seventh would be $50,000 in real estate and $100,000 in securities and cash.

A. $65,000 she paid for the real estate.

By Mr. Cooper:

Q. So that the whole estate would be about $765,000, of which $65,000 represented real estate and about $700,000 in securities?

A. Yes.

Q. And the trust with which we are concerned was created in March, 1928, and represented about $100,000 of the securities?

A. That is correct.

Mr. Cooper: Thank you, sir, that is all.

Mr. Phillips: That is all.

By The Court:

Q. By the way, Mr. Workman, she went to Maine each year for a vacation?

A. Yes, sir.

Q. How many years had she been going to Maine?

A. She started going to Sargentville when she was attending Bryn Mawr College—that was the reason for her going there. Then she took her children there also.

The Court: All right.

Mr. Phillips: Miss Schmitz.

Augusta E. Schmitz, having been duly sworn was examined and testified as follows:

Direct-examination.

By Mr. Phillips:

Q. Miss Schmitz where are you employed?

A. Fidelity-Philadelphia Trust Company.

Q. What was your position there in 1928?

A. I was secretary to Mr. Denny, one of the vice-presidents.

Q. Do you recall Mrs. Stinson coming there?

A. I do.

Q. You knew her?

A. Yes, I knew her.

Q. Your name is on this trust as one of the witnesses, is that correct?

A. Yes, sir.

Q. And you are that person?

A. Yes, sir.

Q. Mr. Denny is dead now?

A. Yes, he is dead.

Q. Do you recall the preparation of this trust in any way? Do you have your file copy of it there?

A. I have one of the copies.

Q. This is from your file at the Fidelity-Philadelphia Trust Company?

A. Yes, it is.

Q. Whose handwriting is this on this note attached to this draft?

A. Mr. Denny's handwriting.

Q. And that is the draft of this trust?

A. Yes, it is.

THE COURT: How much factual testimony will you have with respect to the contemplation of death here? I did not hear any cross-examination of Mr. Workman, and accordingly it is undisputed that she was in good health, going to Maine during part of the vacation, and the ordinary routine of living.

MR. COOPER: I have no witnesses on that, if your Honor please.

THE COURT: If it is not going to be denied actually, there is no use taking a great deal of time on it.

MR. COOPER: I do not think there is any doubt about her being apparently in good health.

MR. PHILLIPS: This is a matter of fact, and I think the evidence that we have is conclusive on that subject. But in the absence of some agreement I think that I have to put my evidence in because the Government has raised that issue.

THE COURT: I know that it ought to go in because that question has been raised. I am addressing my question to counsel, as to whether we need all of the factual testimony if it is not to be contradicted?

MR. PHILLIPS: I can state what evidence we have if—

THE COURT: Is there any doubt about it?

MR. COOPER: I do not know. I do not know what the facts are. I have no information one way or the other.

THE COURT: You do not deny it?

MR. COOPER: Because we do not know.

THE COURT: All right. I suppose that you better put it in.

MR. PHILLIPS: In order that you may understand what I am putting in here, your Honor, the first draft of this trust does not contain this reverter on which the Government relies. The pencil memorandum written by Mr. Denny shows that he must have suggested it, as it is in the last draft.

The witness has identified these papers, and therefore I offer them in evidence for the purpose of making that point. It has nothing to do with the contemplation of death. There are a series of witnesses here on that point, but this witness is here now and I should like to make that point now.

THE COURT: What is the purpose of this testimony, to show what?

MR. PHILLIPS: To show that the reverter interest, or reservation of the power to appoint by will in the event that the whole family dies out was put in by a note in Mr. Denny's handwriting. In other words, Mr. Workman did not originate that or make that suggestion,—it is a very minor point.

MR. COOPER: I object to this going in. I think that the instrument that was finally instituted is the only one to be considered.

THE COURT: All right, we will take it subject to the objection. The objection is overruled.

By Mr. Phillips:

Q. That handwriting on that draft is Mr. Denny's handwriting?

A. Yes, it is.

Mr. Phillips: That is Plaintiff's Exhibit—

(The document referred to was marked Plaintiff's Exhibit 2, and is filed with these proceedings.)

By Mr. Phillips:

Q. What kind of person was Mrs. Stinson when you saw her,—did she ever come in on crutches or—

A. No.

Q. What kind of a person was she when you observed her?

A. She appeared to be a person who was very well, very cheerful in disposition and very friendly.

Q. Did you have occasion to chat with her?

A. Frequently.

By The Court:

Q. Do you remember this particular occasion of her coming?

A. Yes, I remember her coming before she signed the deed of trust.

Mr. Phillips: Cross-examine.

Mr. Cooper: No cross-examination.

Mr. Phillips: That is all.

Mr. Phillips: I would like to interrupt the natural sequence of my witnesses here because I have another witness who has come out at some trouble to himself, an actuary, and I would like to put him on the stand?

THE COURT: All right.

MR. PHILLIPS: Mr. Hendrickson.

JAMES HENDRICKSON, having been duly sworn was examined and testified as follows:

Direct-examination.

By MR. PHILLIPS:

Q. What is your business?
A. Actuary.

THE COURT: By the way, how was this to end?

MR. PHILLIPS: After Mrs. Stinson's death the income was to go to the daughters, and as each daughter died the principal was to go absolutely to her issue, which would be the grandchildren of Mrs. Stinson, and if the first one died without children it would go to the other children.

MR. COOPER: And if both daughters predeceased their mother the estate was to be disposed of as she directed in her will.

MR. PHILLIPS: If the daughters died without surviving issue it was to go as she might want in the will. Testimony will be produced to show the value of that remainder under these circumstances.

Paragraph VIII of the stipulation provides that the value of a remainder after the death of the survivor of the two girls at their age was 14.03 cents on the dollar. In other words, if you had a dollar of principal the value of the remainder to the two girls as of that age at the death of Mrs. Stinson would be 14.03 cents.

MR. COOPER: Upon our theory of the case this testimony would be irrelevant because we think the decision in the Hallock case makes this unnecessary and upon that theory I am objecting to all testimony by this expert.

THE COURT: I will take it subject to your objection.

By MR. PHILLIPS:

Q. What is your business?

A. Actuary.

Q. By whom are you employed?

A. Provident Mutual Life Insurance Company.

Q. How long have you been employed as actuary with the Provident Mutual Life Insurance Company?

A. Fourteen years.

Q. In the course of your employment you work on actuarial problems?—

MR. COOPER: Perhaps we can shorten this by having the witness state the value, over my objection.

THE COURT: I suppose he wants to bring out qualifications.

MR. COOPER: I am not challenging that. If he just states the value.

THE COURT: All right, get right down to the value.

By MR. PHILLIPS:

Q. Have you read this trust of Mrs. Stinson, of March 1928?

A. I have read a copy of it.

Q. You have read a copy of it?

A. Yes, sir.

Q. And have you calculated the value of the power of appointment that is referred to by Mrs. Stinson after the death of her two daughters without issue?

A. Yes.

Q. What value would you place on each dollar of principal?

A. The value I would place on that reverter would be 1.24 of one percent.

Q. That would be a little over a cent on the dollar?

THE COURT: 1.24 cents on the dollar.

By MR. PHILLIPS:

Q. You have done that by consulting tables and other information at your disposal?

A. That is correct.

MR. PHILLIPS: In view of the stipulation I will submit the witness to cross-examination at this time.

THE COURT: All right.

Cross-examination.

By MR. COOPER:

Q. Have you figured what the total would be,—what would you figure that interest to be worth?

A. For each one dollar of principal—

Q. And that is multiplied by $84,000?

A. Yes. 1.24 multiplied by the amount of the principal. I do not know that amount.

MR. COOPER: Nothing further.

MR. PHILLIPS: That is all, Mr. Hendrickson.

MR. PHILLIPS: Mrs. Whitridge, will you take the stand, please.

THE COURT: I am a little bit confused as to the value, —the 1.24 multiplied by 84,000—

MR. PHILLIPS: The principal of this trust on the death of the decedent was $84,000, and we have stipulated that the value of the remainder after the death of the two girls would be 14 cents on the dollar, which would make the total .14 times 84,000, which would be about $11,000; and this reverter is still further removed by reason of the contingency and condition that the two daughters must die without issue. That involves the probabilities of these daughters marrying and having issue, because only in the event that there are none would the reverter ever take effect; therefore, its value is still further reduced, and this witness has testified that the value of such remainder would be 1¼ cents on the dollar of principal.

THE COURT: Yes, that is it,—1.24 cents on the dollar of principal. I see.

MR. PHILLIPS: That would be about eight or nine hundred dollars.

FLORENCE STINSON WHITRIDGE, having been duly sworn was examined and testified as follows:

Direct-examination.

By MR. PHILLIPS:

Q. You are one of Mrs. Stinson's daughters, is that correct?

A. That is right.

Q. I suppose that you lived with your mother all your life?

A. Yes, sir.

Q. By the way, where did you go to school?

A. The Baldwin School, right across the street.

Q. And after that?

A. I went to Bryn Mawr for two years.

Q. Did you live at any of the schools, or did you come home?

A. Before mother's death I was planning to live at college, but I only lived there about two months.

Q. You had always lived at home?

A. Yes, sir.

Q. And you had abundant opportunity to observe your mother?

A. Yes, sir.

Q. Did you ever know of any illness?

A. None that I can remember.

Q. You do not know anything about the creation of this trust, as I understand it?

A. No.

Q. What kind of a person was your mother? Was she active?

A. She was very active.

Q. Did she manage the household?

A. Yes, indeed.

Q. Did she attend to the household and taking care of the grounds around the house?

A. She did not actually work outdoors, but she would oversee the garden.

Q. Did you go abroad with her in 1930?

A. Yes.

Q. What kind of a trip was that,—did she spend all her time in a hotel or did she travel around?

A. We covered four countries,—three months abroad, travelling almost continuously.

Q. Did she do much walking?

A. Well, we saw all places of historical interest that we could possibly cover in that time.

Q. She climbed around with you?

A. Yes.

Q. She didn't stay home while you went out?

A. Oh, no.

Q. She was perfectly well, as far as you know, during that trip?

A. Absolutely.

Q. Did you accompany your mother on these annual trips to Maine?

A. Every year.

Q. For how long was that,—as long as you can remember?

A. I think from about 1924.

Q. From about 1924?

A. Yes.

Q. Did you ever observe any indications of ill-health in your mother?

A. Not until the last summer in 1934.

MR. PHILLIPS: Cross-examine.

Cross-examination.

By MR. COOPER:

Q. When did you first notice your mother complain, or did she complain at all?

A. No, she did not,—you mean before that summer, never.

Q. At any time that you recall?

A. No, never.

Q. Did she complain before her death at all?

A. No.

Q. Of what did your mother die?

A. Well, after she died, we were told she had a heart condition; she died of heart trouble. That is what caused her death, we were told.

MR. COOPER: That is all.

By THE COURT:

Q. In 1934, you say that summer you noticed the condition of your mother?

A. She had tonsillitis that summer.

Re-direct-examination.

By Mr. Phillips:

Q. Were you present when this picture was taken? (Indicating)

A. Yes, this was taken the day of my coming-out.

Q. She came back from Maine for that purpose?

A. Yes, sir.

Q. And did she actively look after the preparations of that occasion?

A. Yes, sir, she did.

Mr. Phillips: I will offer this picture in evidence. If it is to be a physical exhibit, I would like to have it marked—

The Court: I do not need it.

Mr. Phillips: That is all, then.

Mr. Phillips: Mrs. Day, will you take the stand.

Nancy Stinson Day, having been duly sworn was examined and testified as follows:

Direct-examination.

By Mr. Phillips:

Q. You are a daughter of Mrs. Stinson?

A. Yes.

Q. I understand that you do not remember anything about the creation of this trust?

A. No, nothing at all.

Q. Did you live at home with your mother all your life?

A. Yes, sir.

Q. Did you go away to school anywhere?

A. No, I never did.

Q. What kind of a person was your mother; how was her health during the time you knew her?

A. Perfect.

Q. Ever know of an illness?

A. No, never.

Q. Was she active in the management of her household, garden, and so on?

A. Very, very.

Q. Did she look after the servants?

A. Yes.

Q. Do you recall her ever having a meal in bed?

A. No.

Q. And you went along on this trip abroad in 1930?

A. Yes, sir.

Q. And would your testimony about that be the same as your sister's?

A. Exactly the same.

Q. You went to all the places with her?

A. Yes.

Q. And did your mother go to all places with you?

A. Yes.

Q. And how about climbing Cathedrals?

THE COURT: Climbing what?

THE WITNESS: Climbing the steps.

By MR. PHILLIPS:

Q. And did she go inside the cathedrals?

A. Yes, sir.

Q. Climb any hills, do you recall?

A. Mount St. Michel. She went to the top of that.

By THE COURT:

Q. How long was your mother sick?

A. When she was in Maine?
Q. No, when she died.
A. About an hour I guess.

MR. COOPER: How long?

THE COURT: About an hour, she said.

MR. PHILLIPS: Cross-examine.

Cross-examination.

By MR. COOPER:

Q. Mrs. Day, were either you or your sister married at the time of your mother's death?

A. No.

Q. Neither of you had been married at that time?

A. No.

Q. You say that you never heard your mother complaining at all?

A. Not at all.

Q. She was active right up to the last?

A. Yes, because she was in town at the hairdresser's when she had the heart attack; we were planning for dinner that night. It was just one activity after another.

Q. She looked after her business affairs, did she?

A. Yes, sir.

MR. COOPER: That is all.

MR. PHILLIPS: Mrs. Conroy.

NELLIE CONROY, having been duly sworn was examined and testified as follows:

Direct-examination.

By MR. PHILLIPS:

Q. Mrs. Conroy, you are employed as cook in Mrs. Stinson's house, is that correct?

A. Yes, sir.

Q. When did you first come with her?

A. In 1924.

Q. And did you stay in that capacity until her death?

A. Yes, sir.

Q. You are still working for one of the daughters in that same capacity?

A. Yes, sir.

Q. Did Mrs. Stinson participate in the management of your part of the household?

A. Yes, sir.

Q. Did she tell you what kind of meals to have, and so on?

A. Yes, sir.

Q. Do you recall any occasion when you served a meal to her in bed for any reason?

A. No, none.

Q. Do you know of any illness on the part of Mrs. Stinson prior to her death?

A. No, I do not.

Q. Did she appear active and healthy during all the time that you knew her?

A. Yes, sir.

Q. Did she look after the two girls?

A. Yes, sir.

Q. And the rest of the household, and the garden?

A. Yes, sir.

MR. PHILLIPS: Cross-examine.

Cross-examination.

By MR. COOPER:

Q. Were you with her at the time she made the trip to Maine, the last trip?

A. No, I was not, sir.

Q. You didn't work for her?

A. I did, but I was home.

Q. You were employed by her when she returned from that trip?

A. Yes, sir.

Q. Did you notice any slowing up of her activities after that?

A. No, sir.

Q. To you she appeared just as active after this trip to Maine?

A. Yes, she managed all of her affairs.

Q. She had tonsillitis at that time?

A. I don't know anything about that.

MR. COOPER: That is all.

By THE COURT:

Q. Did she ever complain to you about her heart?

A. No, sir.

Q. Never?

A. No, your Honor.

THE COURT: All right.

MR. PHILLIPS: That is all, your Honor.

MR. PHILLIPS: Dr. Lincoln.

DR. CLARENCE W. LINCOLN, having been duly sworn was examined and testified as follows:

Direct-examination.

By MR. PHILLIPS:

Q. Dr. Lincoln, you are a brother-in-law to Mrs. Stinson are you not?

A. Yes, sir.

Q. Were you the family physician for many years?

A. I attended the children when they were sick. I do not know of any other doctor that they had, and I do not remember seeing Mrs. Stinson for any troubles.

Q. You do not recall ever having attended her?

A. I do not recall ever attending her.

Q. How long have you practiced medicine?

A. I graduated in 1893, and I was in the laboratory for a year or two,—I started in 1896.

Q. You gave up the active practice of medicine some years ago?

A. About five years ago.

Q. Do you recall the occasion of Mrs. Stinson's tonsillitis attack in the summer of 1934?

A. Yes, sir.

Q. Were you in Maine at the time?

A. I was in Maine; she was in my house, and had this attack of tonsillitis.

Q. What did you do about that?

A. The usual treatment,—tucked her in bed, and soothed her pain, and gave her medicine as indicated.

Q. She recovered sufficiently to—

A. She recovered and got up, but I pleaded very strenuously against her going home, but she had these cards out for this coming out of her daughter.

Q. This party?

A. And she had to go home, but I very much pressed her not to go home.

Q. Were you present when she actually died?

A. I was.

Q. I think you were present when she was first taken ill, or, tell us what you know about it?

A. I received a telephone message from a hairdressers that Mrs. Stinson had fainted in the hairdressing shop and wanted me to come in. I came in on the first train I could get —

By The Court:

Q. Was that in the City?

A. That was in the City.

I came in on the first train I could get, and found her recovered, but she was worried about going home alone.

By Mr. Phillips:

Q. That was at the hairdressers?

A. That was at the hairdressers.

I went home with her in her car, and went up with her to her room, and helped her to undress, and then she wanted to take off her corset and went into the big closet and fell in there. I called Dr. Christy, a neighborhood doctor, but we could not make her recover.

Q. And she died there?

A. She died.

Mr. Phillips: Cross-examine.

Cross-examination.

By Mr. Cooper:

Q. Did you ever have occasion to inform yourself about her physical condition around March of 1928?

A. No, I was not consulted. As her brother-in-law I thought she was perfectly well and had no worries.

Q. Did you have occasion ever to examine her?

A. I do not think I did.

Q. You are speaking now only around March, 1928 or—

A. I do not think I ever took her blood pressure or examined her heart.

Q. You did not know, then, until her actual death that she apparently was suffering from a heart ailment.

A. No, I did not know.

Q. Were you the only physician who attended Mrs. Stinson?

A. I have no knowledge of any other.

Q. She never had medical attention up until her last illness?

A. As far as I know she had not.

MR. COOPER: That is all.

By THE COURT:

Q. What was the exact cause of her death?

A. I think it was a damaged heart due to this tonsillitis; that is the way I took it, got up too soon.

Q. She did not suffer a stroke?

A. No, no.

Q. And there was no blood clot?

A. No.

Q. Did she complain of her heart at Sargentville?

A. I do not remember how I formed the opinion, but I felt that she should not get up and strenuously urged her not to,—whether it was simply the acute depression of the sickness at the time, I do not know.

THE COURT: All right.

By MR. COOPER:

Q. That was in September, 1934, that you had reference to there?

A. Yes, that was in September, 1934.

Q. But, you had no knowledge of her physical condition in or around March of 1928, or prior thereto?

A. No, I do not.

By THE COURT:

Q. You had no knowledge of her physical condition,—you were her brother-in-law,—you had knowledge of her physical condition generally?

A. Yes, I know.

By Mr. Cooper:

Q. How did you gain that knowledge?

A. Simply from being her brother-in-law and knowing her.

Q. But you never made any physical examination?

A. I never made any physical examination to my recollection.

Q. Would it have been possible that this heart ailment had persisted for some time?

A. Oh, yes, yes, that is possible, but she had no symptoms of it.

Q. No outward symptoms?

A. No, no symptoms of it.

Q. How would these symptoms have been disclosed,—by—what do you call it,—clinical examination?

A. If she had had a clinical examination there might have been some symptoms.

Q. They would have been disclosed?

A. But as far as I know, she had none.

Mr. Cooper: Thank you, that is all.

Mr. Phillips: Mrs. Whitridge, will you just take the stand again?

Florence Stinson Whitridge, recalled.

Direct-examination (Continued).

By Mr. Phillips:

Q. Mrs. Whitridge, do you know of any other physician ever attending your mother other than Dr. Lincoln?

A. No, I do not.

Q. Did he ever attend you?

A. Yes, lots of times when we were sick.

Q. He was in your home often as physician for you and your sister?

A. Yes.

MR. PHILLIPS: That is all. I think we are through.

THE COURT: All right, the Plaintiff rests.

MR. PHILLIPS: Yes, the plaintiff rests, if your Honor please.

DEFENDANT'S EVIDENCE.

MR. COOPER: I merely want to offer in evidence a certified copy of the claim for refund as Defendant's Exhibit 1,—a certified photostatic copy.

THE COURT: Is that in the stipulation?

MR. PHILLIPS: That is in the stipulation.

THE COURT: All right.

(The document referred to was marked Defendant's Exhibit 1, and is filed with these proceedings.)

MR. COOPER: We have also stipulated that claim for refund was filed—

MR. PHILLIPS: Perhaps I should have offered that in evidence.

THE COURT: That is what struck me, but it is all right.

MR. PHILLIPS: There is no reason for it being in the second time.

MR. COOPER: The defendant rests, your Honor.

I have no written request for findings and conclusions which I have prepared to file at this time,—unless the court would permit the request for findings and conclusions to be filed with the brief.

THE COURT: I think you better do that.
Did counsel want to be heard?

MR. COOPER: I do not, as far as I am concerned.

THE COURT: I would not mind hearing you, it is a very interesting question.

(Discussion off record.)

THE COURT: All right, when do you want to file brief?

MR. COOPER: If your Honor would give me forty-five days.

(Discussion off the record.)

THE COURT: And I think you ought to file your requests with these briefs.

MR. PHILLIPS: All right, I will send them down to your Honor.

MR. COOPER: That will give us each forty-five days in which to file briefs.

THE COURT: And Mr. Phillips gets ten days within which to file a reply brief to your brief.
Then, it will be set down for argument.

6. OPINION.

GANEY, *J.*:

This is an action by the plaintiffs, against the defendant in the sum of Thirteen Thousand, Four Hundred Forty-two and 90/100 Dollars ($13,442.90), with interest from December 24, 1936, which is the portion of the estate tax paid by the plaintiffs, allegedly erroneously, by reason of the inclusion by the defendant in the gross assets of the estate of the decedent the corpus of a trust valued at the date of the decedent's death, at Eighty-four Thousand, Four Hundred Thirty-three and 49/100 Dollars ($84,433.49).

With respect thereto the Court makes the following

FINDINGS OF FACT:

(1) The plaintiffs are the executors of the Estate of Anna C. Stinson, a widow, a former resident of Bryn Mawr, Pennsylvania, who died testate on November 17, 1934, at the age of fifty-one (51) years.

(2) The decedent was survived by two daughters, Florence V. Stinson, then nineteen years of age, and Nancy C. Stinson, then seventeen years of age, neither of whom had married, and by James C. Workman, Mary W. Lincoln, Adelaide W. Denny and Robert A. Workman, her brothers and sisters.

(3) On September 5, 1935, the Executors filed an estate tax return showing an estate tax due of Fifty-three Thousand, Three Hundred Eighty-six and 59/100 Dollars ($53,386.59); in this return there was not included the value of the property of a certain trust created on March 26, 1928, the value of which at the date of the decedent's death was Eighty-four Thousand, Four Hundred Thirty-three and 49/100 Dollars ($84,443.49).

(4) An audit by the Commissioner of Internal Revenue of the estate tax return, resulted in an increase in the value of the decedent's gross estate in the amount of the corpus of the trust to wit: Eighty-four Thousand, four Hundred Thirty-three and 39/100 Dollars ($84,433.39).

(5) On November 22, 1939, the Executors filed a claim for refund in the amount of Thirteen Thousand, four Hundred Forty-two and 90/100 Dollars ($13,442.90), alleging as a ground therefor that there had been erroneously included as part of the decedent's estate the value of the corpus of the trust created by the decedent on March 26, 1928.

(6) The Commissioner of Internal Revenue on May 3, 1941, denied the contention that the Trust corpus should not be included in the decedent's gross estate, thereby dismissing the claim and hence the plaintiffs suit for the amount of the tax, to wit: Thirteen Thousand, four hundred forty-two and 90/100 Dollars ($13,442.90).

(7) A deed of trust, executed by the decedent hereinafter referred to, contained the following provisions important to this action:

> "In Trust, Nevertheless, to and for the following uses, intents and purposes:
>
> In Trust to take, hold, manage and control and to invest and keep invested and the net income therefrom to pay at quarterly or other convenient periods to the said Settlor for and during all the term of her natural life, and at her death.
>
> In Trust to pay the said net income, in equal shares, to Florence V. Stinson and Nancy C. Stinson, daughters of the said Settlor, during their respective lives.

IN TRUST, at the death of each daughter of said Settlor, to pay over the corpus or principal supporting such daughter's share of income to her then living descendants, per stirpes, absolutely.

IN TRUST, in the event of the decease of either daughter of said Settlor without leaving descendants surviving, to add the corpus or principal of such daughter's share to the share of the other daughter of said Settlor, if then living, or to the then surviving descendants, per stirpes, of such other daughter if then dead, such descendants to take their deceased ancestor's share by representation; the share so accruing to a surviving daughter of said Settlor to be held upon the same trusts as her original share.

IN TRUST, in the event of the death of both daughters of said Settlor without leaving descendants surviving, to pay over the corpus or principal of the within created trust estate to such person or persons and upon such estate or estates as the said Settlor shall by her last Will and Testament direct, limit and appoint, and in default of such appointment then to assign, transfer and pay over the said corpus of principal of the within created trust Estate to the Presbyterian Home for Aged Couples and Aged Men of the State of Pennsylvania, at Bala, Pennsylvania; the Presbyterian Orphanage in the State of Pennsylvania now located at Chester Avenue and Fifty-eighth Street in the City of Philadelphia; the Presbyterian Hospital now located at Thirty-ninth and Filbert Streets, Philadelphia; the Bryn Mawr College at Bryn Mawr, Pennsylvania, and the Philadelphia Home for Incurables now located at Forty-eight Street and Woodland Avenue, Philadelphia, in equal shares, absolutely.

* * * * * * * *

IT IS HEREBY DECLARED BY THE said Settlor that she has been fully advised as to the legal effect of the execution of this Indenture and informed as to the character and amount of the property hereby transferred and conveyed; and, further, that she has given consideration to the question whether the settlement herein contained shall be revocable or irrevocable, and she hereby declares it to be irrevocable, and that it shall stand without power in her, the said Settlor, at any time to revoke, change or annul any of the provisions herein contained."

(8) At the time of the creation of the trust on March 26, 1928 the decedent was a widow, approximately 45 years of age, the mother of two daughters, twelve and ten years respectively, with four brothers and sisters living; she was in excellent health with no evidence of any illness of any kind, nor any expectancy of an early death and was possessed of property of the value of Seven Hundred Sixty-five Thousand Dollars ($765,000.00), Seven Hundred Thousand Dollars ($700,000.00) of which consisted of securities and Sixty Five Thousand Dollars ($65,000.00) the value of the property in which she resided.

(9) On June 6, 1930 the decedent executed a will, paragraph fourth thereof included the following:

FOURTH: All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die siezed and possessed, or which I may have in expectancy or remainder, or over which I may have power of disposition by Will, hereby expressly exercising any such power in me vested, I give, bequeath and devise to my Executors hereinafter named, In Trust, nevertheless, to take, hold, manage and control,

* * *

* * * * * * * *

IN TRUST, in the event that at the time of the decease of the last survivor of my said two daughters there shall be no descendants of either of my daughters then living, then my said residuary estate shall continue in the hands of my Trustees, in Trust, and the net income therefrom shall be paid in equal shares to my brothers and sisters, James C. Workman, Mary W. Lincoln, Adelaide W. Denny and Robert A. Workman, for and during their respective lives, and upon the decease of each, or upon my decease, in the case of any of them who may predecease me, to assign, transfer and pay over the share of corpus or principal producing, or which would have produced the share of income of my brother or sister so dying, in equal shares, to The Presbyterian Hospital in Philadelphia, The Contributors to the Pennsylvania Hospital, The Philadelphia Home for Incurables and The Board of National Missions of the Presbyterian Church of the United States of America for the general purposes of the said organizations, and to be known as "The Robert M. Stinson Memorial."

(10) Since decedent's death, there has been born to her two daughters, three children, so that presently there are surviving her two daughters and three granddaughters.

(11) The trust was testamentary in character and was intended as a substitute for a testamentary disposition in that it was intended to take effect in possession or enjoyment after the death of the decedent.

The Court makes the following

CONCLUSIONS OF LAW:

(1) The transfer by trust made on March 26, 1928 was intended to take effect in possession and enjoyment at or after the decedent's death within the meaning of Section 302 (c) of the revenue Act of 1926, as amended,

and the value of the property of the trust at the date of the decedent's death was Eighty-four Thousand, Four Hundred thirty-three and 39/100 Dollars ($84,433.39), and this was properly included in the value of her gross estate for estate tax purposes.

(2) The Commissioner of Internal Revenue has correctly assessed the amount of federal estate tax due from the decedent's estate and there has not been an overpayment of such tax.

(3) The federal estate tax sought to be recovered was properly and lawfully determined and assessed by the Commissioner of Internal Revenue, and legally collected from the plaintiffs by the defendant, and by reason thereof, the complaint must be dismissed and the costs assessed against the plaintiff.

(4) On the facts and the law judgment of the court must be against the plaintiff and in favor of the defendant.

OPINION.

The defense interposed against the plaintiffs' claim for refund of the estate tax here paid is twofold, (1) That the property transferred under the trust indenture of March 26, 1928 was made in contemplation of death and (2) that the transfer thereof was intended to take effect in possession or enjoyment at or after the decedent's death.

While a life estate is reserved to the settlor in the trust indenture here considered, it is to be remembered that the amendment to Section 302 (c) taxing transfers with life estates reserved to the grantor was adopted March 3, 1931 and the date of this trust indenture was March 26, 1928, and therefore the amendment is not applicable. Furthermore, the amendment cannot take effect retroactively. Hassett v. Welch, 303 U. S. 303; 58 S. Ct. 559, 82 L. Ed. 858.

With reference to the first contention made by the defendant that the transfer was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926 as amended, it must be borne in mind that no evidence of any physical disability on the part of the decedent was shown by the defendant. On the contrary however, it is not denied that the decedent prior to her death had been in excellent health, with no evidence of any illness, nor any evidence of an anticipation of early death. At the time of the creation of the trust she was in the prime of life, about 45 years of age, the mother of two daughters, ten and twelve respectively and possessed of a considerable fortune, in excess of three quarters of a million dollars. While it is now settled law that "contemplation of death" within the meaning of the statute does not of necessity imply fear of imminent death, nor need there be a condition existing creating "a reasonable fear that death is near at hand," nevertheless it must be such a transfer that the person making it, is influenced to do so, by such an expectation of death arising from bodily or mental conditions, as prompts him to dispose of his property to those he deems proper objects of his bounty. Milliken v. United States, 283 U. S. 15. In United States v. Wells, 283 U. S. 102, at 118, the court describes the meaning of the phrase as follows: "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand'." Since it is the thought of death which must be the controlling motive prompting the disposition of property, it is requisite that careful scrutiny be given to the circumstances of every case in order that one might detect the dominating motive of the donor in the light of his bodily and mental condition in giving effect to the

purposes of the statute. Russell et al. v. United States, 38 Fed. Supp. 438. A careful consideration of all the circumstances surrounding this transfer does not convince me that it was made in contemplation of death.

With respect to the other contention of the defendant that the transfer was intended to take effect in possession or enjoyment at or after the death of the settlor, it is to be remembered, although the tax is a death tax, that Section 302 (c) of the Revenue Act of 1926 applies to any interest in gifts inter vivos which, by their provisions, are "intended to take effect in possession or enjoyment at or after death," and such gifts are subjected to the tax as a death tax if they are not complete until the donor's death. Reinecke v. Northern Trust Co., 278 U. S. 339, 345. The taxable event is the transfer inter vivos but the measure of the tax is the value of the transferred property at the time of the death of the transferor. It seems to me therefore that the time to be considered in gleaning the intent or motive of the transferor in any case is, as here, the time of the transfer under the trust indenture of March 26, 1928. In other words, we are to consider the situation as created by the language of the trust indenture at the time of the transfer and not in the light of what has eventuated thereunder, as for instance the progress of the estates created. In so doing, we find that the transferor made provision for the reversion to her of the corpus of the fund in the event that her daughters predeceased her or if they died without issue or if leaving issue, they should predecease them. In the happening of any of these events, pursuant to the terms of the deed of trust, the corpus was to be disposed of by the settlor in her last will and testament.

Our question then is, was the transfer under the deed of trust of March 26, 1928 irrevocable, complete and unaffected in any manner by the death of the settlor, or was it while irrevocable, yet incomplete in the giving, and to that extent to take effect at or after the death of the settlor?

In determining this question we have recourse to a number of cases in which the statute has been construed by the Supreme Court. In Klein v. United States, 283 U. S. 231, the habendum clauses in a deed conveyed a life estate to the grantee providing that if she should die prior to the decease of the grantor, the reversion in fee should remain vested in the grantor, but that if the grantee should survive the grantor, the said grantee should take the lands in fee simple. It was held by the court that the remainder was retained by the grantor, and whether it would ever become vested in the grantee, depended upon the condition precedent that the death of the grantor happen before that of the grantee, and the grant of the remainder was therefore contingent. Further the court said at page 234: "It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed." The principle which the court invoked in this case in subordinating the niceties of the law of contingent and vested remainders to the more realistic views of taxation was rejected in Becker v. St. Louis Trust Co., 296 U. S. 48, and in Helvering v. St. Louis Trust Co., Ibid. 39. In this latter case the decedent, several years prior to his death, created a trust in favor of his daughter for life, with remainder to certain named persons, with a provision amongst other that if his daughter predeceased him, the trust should terminate and be paid over to him absolutely. In construing this language the court held that the corpus was not taxable as part of the decedent's gross estate, saying at page 43: "After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility." The court

drew a distinction between this case and the Klein case, supra, by saying that in the latter case the grantor by having died first, his death effected the transmission of a larger estate to the grantee, but that in the St. Louis Trust Co. case, the grantor parted with the title and all beneficial interest in the property, retaining nothing which could pass to anyone as a result of his death and that his death destroyed all possibility of the grantor coming into possession of the reversionary interest. In Helvering v. Hallock, 309 U. S. 106, the settlor in the trust agreement provided for a life estate to his wife and if she predeceased him, it was to revert to the settlor but that if the settlor should die first, then after the expiration of the life estate to his wife, the corpus was to go to his son and daughter, share and share alike. In this case the court rejected the theory of the Helvering v. St. Louis Trust Co. supra and Becker, supra, and returned to the doctrine of the Klein case, supra, holding that it was the intent of Section 302 (c) to include in the gross estate gifts inter vivos which are resorted to as a substitute for a will, in making disposition of property operative at death and to effectuate this purpose, practical considerations of taxation should prevail and not the niceties of the art of conveyancing; that as in the Klein case, supra, the decedent's death operating on his gift inter vivos not complete until his death, is the event which calls the statute into operation. Here, I feel the instant case falls within the doctrine of Helvering v. Hallock, supra, as the gift was not a complete transaction but rather it was one where the settlor wished to keep the corpus of the trust for herself for disposition in the event she survived her daughters without issue and this string provided in the trust agreement—the possibility of which was great or remote depending upon the life of her daughters, and their issue—was sufficient to bring it within the terms of the statute. The plaintiff has pressed upon the court the case of Commissioner v. Kellogg, 119 Fed. (2d) 54, decided in this circuit as ruling the

instant case. In that case, the grantor reserved to himself an estate for life and then to his wife and upon the death of the survivor of these two the corpus was to be divided into as many parts as there were surviving children, together with one equal part for each of the children then dead, but leaving spouse or issue surviving. One half of the share of each child was to be paid over when the child reached twenty-one years of age and the other one-half when it became thirty-two years of age. Upon the death of a child who received his share, such share was to pass to his spouse or issue as he should appoint by will, or in default thereof, to his next of kin. That if all of the children of the grantor and his wife should predecease them, leaving no spouse or issue, all of the corpus was to pass to the next of kin as provided by the laws of New Jersey relating to the disposition of personal property in the case of intestacy. However, this case is distinguishable from the instant case, in that in the former the generating source of the whole title was the trust instrument but in the instant case the death of the settlor was the final factor which gave completeness to the gift. In other words, in the Kellogg case, supra, there was a complete divestment of title and a complete irrevocable gift of the entire title by the settlor but in our case while the trust was irrevocable, the gift was not complete until the death of the settlor which resulted in defining those to be the beneficiaries of the possible reversionary interest. There was here a string on the gift which was not present in the Kellogg case, supra. Whatever may have been the situation before the decision in Helvering v. Hallock, supra, I think the possibility of the reversionary interest going back to the settlor had her children died before here, or had they died without leaving issue, was terminated by her death and this determination of her interest was an event which rendered the interest includable in her gross estate. To take into consideration the relative ages of the settlor and her daughters, in attempting to weigh the probability of

the reversionary interest ever going to the settlor and as a consequence her power to make disposition of it, advances the solution of the question here involved, not at all, since it is sufficient if the contingency exists which might bring the reversionary interest within the powers set out in the trust instrument and implemented by the will.

Accordingly, I hold that the life interests of the decedent's daughters and the interest given to the decedent's brothers and sisters (by deed in trust supplemented by the will) constitute the remainder, after the decedent reserved a life estate over which the decedent retained a string or measure of control, and that the death of the decedent was the event or contingency which suspended the ultimate disposition of the property and upon the authority of the Klein and Hallock cases, supra, the entire value of the property on the date of the decedent's death was properly taxed as part of her gross estate as a transfer intended to take effect in possession or enjoyment at or after death.

Judgment is accordingly entered for the defendant.

7. JUDGMENT.

Before GANEY, *J.*

AND NOW, to wit: January 8th, 1943, in accordance with the opinion of the Court, it is ORDERED that Judgment be and hereby is granted in favor of defendant, Walter J. Rothensies, Individually and as Collector of Internal Revenue for the First District of Pennsylvania and against the Plaintiffs, Fidelity-Philadelphia Trust Company and Robert A. Workman, Executors of the Estate of Anna C. Stinson, Deceased, with costs.

By The Court:
Attest: GILBERT W. LUDWIG,
Deputy Clerk.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 8291

FIDELITY-PHILADELPHIA TRUST CO., et al., Exrs. Est. Anna C. Stinson, Appellants,

vs.

WALTER J. ROTHENSIES, etc.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to-wit: this 17th day of May A. D. 1943, it is ordered that Hon. Calvert Magruder, U. S. Circuit Judge, for the First Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Assigning Hon. Calvert Magruder for Argument. Received and Filed May 17, 1943. Wm. P. Rowland, Clerk.

[fol. 82] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 8291

FIDELITY-PHILADELPHIA TRUST COMPANY and ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased, Appellants,

vs.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue

And afterwards, to wit, the 17th day of May, 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Calvert Magruder and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 15th day of May, 1944, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 83] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 8291

FIDELITY-PHILADELPHIA TRUST COMPANY and ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased, Appellants,

v.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue for the First District of Pennsylvania

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Biggs, Magruder and Jones, Circuit Judges

OPINIONS OF THE COURT—Filed May 15, 1944

By BIGGS, Circuit Judge:

On March 26, 1928 Anna C. Stinson irrevocably transferred certain property to a trust which she created. Mrs. Stinson was the mother of two daughters who at that time were minors and unmarried. The indenture provided that the income from the trust was to be paid to the settlor dur-[fol. 84] ing her lifetime [1] and upon her death to her daughters, in equal shares during their respective lives. At the death of each daughter, the corpus or principal supporting that daughter's share of income was to be paid to her descendants *per stirpes*. In the event that either daughter died without leaving descendants surviving her, the corpus or principal supporting that daughter's share of income was to be added to the share of the other daugh-

[1] The retention of the life estate by Mrs. Stinson is not sufficient in itself to render the corpus of the trust includible in her estate for estate-tax purposes. See Note 3 of the opinion in Commissioner of Internal Revenue v. Kellogg, 119 F. 2nd 54, at page 56.

ter if she was then living, or should go *per stirpes* to the surviving descendants of the other daughter if she was then dead. In the event of the death of both daughters without leaving surviving descendants, the corpus was to be paid to such persons as the settlor should appoint by will. In default of such appointment, the trustee was to pay the corpus to certain charities named in the indenture. Mrs. Stinson died on November 17, 1934 at the age of fifty-one. Both daughters survived her and at the time of their mother's death were unmarried. At the time of the hearing before the court below both daughters were married. One daughter had one child; the other, two children.

The primary question presented for our determination is whether Section 302(c) of the Revenue Act of 1926, 44 Stat. Vol. 2, 70, requires the inclusion of the corpus of the trust in Mrs. Stinson's estate for estate-tax purposes.

The learned District Judge held that the trust was testamentary in character and that gifts granted by the indenture were, to employ the language of the statute, "intended to take effect in possession or enjoyment at or after . . . death . . .".[2] He based his conclusions on the decisions of the Supreme Court in Klein v. United States, 283 U. S. 231, and Helvering v. Hallock, 309 U. S. 106. The [fol. 85] appellants rely on the decision of this court in Commissioner of Internal Revenue v. Kellogg, 119 F. 2nd 54.

Turning to Helvering v. Hallock, supra, which must control our decision in the case at bar, Mr. Justice Frankfurter directs our attention (309 U. S. at p. 110) to the necessity of determining "Whether the transfer made by the decedent in his lifetime is 'intended to take effect in possession or enjoyment at or after his death' by reason of that which he retained, . . ." That is the crux of the problem. The tax tribunals are admonished to avoid decisions based upon linguistic refinements and verbal resemblances of one trust indenture to another. The St.

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[2] The District Court in its eleventh finding of fact stated:

"The trust was testamentary in character and was intended as a substitute for a testamentary disposition in that it was intended to take effect in possession or enjoyment after the death of the decedent."

Louis Trust cases (Helvering v. St. Louis Trust Co., 296 U. S. 39 and Becker v. St. Louis Trust Co., *Ibid* p. 48) were expressly overruled, as was the decision of this court in Rothensies v. Cassell, 103 F. 2nd 834,[3] whereas the decision of the Court of Appeals for the Second Circuit in Bryant v. Commissioner, 104 F. 2nd 1011, was affirmed.

In every one of the cases overruled by the Supreme Court in Helvering v. Hallock the settlor or testator had created express conditions or contingencies upon the happening of which he could have regained the corpus of the trust. In each case the Supreme Court held that the settlor or testator had made gifts testamentary in character and intended to take effect in possession or enjoyment at or after his death.[4]

In the case at bar, Mrs. Stinson did retain a string or tie, whereby, upon the happening of certain contingencies she could have regained control of the corpus of the trust at least to the extent of making it subject to testamentary bequests. Must it be said that for this reason she, like the grantor in Helvering v. Hallock, ". . . selected to hold in suspense the ultimate disposition of . . . [the] property until the moment of . . . death."? We think [fol. 86] that the answer must be in the affirmative. The case at bar is distinguishable from the Kellogg case on which the appellant strongly relies for in that case, as we have stated, 119 F. 2nd at p. 57, ". . . the fact of importance . . . is that the grantor during his lifetime disposed of his interests in the corpus of the trust as well as any man could." Kellogg retained nothing. He had merely a possibility of reverter. As is said in Paul's "Federal Estate and Gift Taxation" Volume I at p. 367, this limitation upon Helvering v. Hallock is a "possible" one.[5]

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[3] In the Supreme Court *sub nomine* Rothensies v. Huston.

[4] Cf. the facts of May v. Heiner, 281 U. S. 238; Reinecke v. Trust Co., 278 U. S. 339; and Shukert v. Allen, 273 U. S. 545.

[5] Mr. Paul also states, Idem at p. 368, "The Third Circuit's refusal to extend the *Hallock* case to a remote reverter contingent upon the survival of the grantor's own next of kin is understandable. It is doubtful, however, whether the rule of that case is dependent upon an express reservation in the trust instrument. A string or tie supplied by a rule of law is as effective as one expressly retained in

The indenture in the case at bar, to employ technical conveyancing terms, puts the remainders in the grantor's grandchildren who were not *in esse* at the time the indenture was executed and the grantor could have recovered the right to dispose of the corpus on the happening of the specified contingencies. For these reasons the case at bar is closer to Klein v. United States, 283 U. S. 231, than to May v. Heiner, 281 U. S. 238.

The appellants contend that if the property transferred is to be included the value of intervening estates must be deducted, citing Helvering v. Hallock (specifically that part of that opinion dealing with Bryant v. Helvering) as well as the provisions of Article 17 of Regulations 80, as [fol. 87] amended by T. D. 5008[6] Neither these decisions

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the trust indenture." A string or tie supplied by a rule of law is as effective as one expressly retained in the trust indenture but the fact that the string or tie is supplied by the indenture is evidence "Whether the transfer made by the decendent in his lifetime is 'intended to take effect in possession or enjoyment at or after his death' by reason of that which he retained, . . ." Helvering v. Hallock, 309 U. S. at p. 110. If the string or tie is expressly retained by the grantor, it is one of the provisions of the indenture to be construed with others in order to determine whether the gift is to take effect in possession or enjoyment at or after the grantor's death. This, however, does not substitute a subjective test for an objective one.

The Kellogg case has been followed by the Tax Court. See Estate of Ballard v. Commissioner, 47 B. T. A. 784, 791; Estate of Bradley v. Commissioner, 1 T. C. 518, 522; Estate of Hofheimer v. Commissioner, 2 T. C. No. 99, and Estate of Houghton v. Commissioner, 2 T. C. No. 110.

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[6] The pertinent portion of the Regulations is as follows:

"Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, *if the life estate is then outstanding.*" (Emphasis supplied.)

nor the Regulations support the appellants' position for in the case at bar the first life estate was in the settlor. Since the disposition of the estate was held in suspense until her death, that event compels the imposition of the tax. The rights of the beneficiaries other than those of the grantor's daughters could not become absolute until the death of the grantor and had to remain contingent or conditional at least until the happening of that event. It is stipulated that the value of the corpus as of the date of Mrs. Stinson's death was $84,433.39 and it was upon this sum that the trial court rested its judgment. This was not error.

One final point remains for discussion. In this case the learned District Judge, while not expressly finding that the transfer to the trust was not made by Mrs. Stinson in contemplation of death, stated, "A careful consideration of all the circumstances surrounding this transfer does not convince me that it was made in contemplation of death." Since there was no substantial evidence from which it could have been found that the transfer made by Mrs. Stinson was made in contemplation of death, we think we are justified in concluding that this is the equivalent of a finding that the transfer was not made in contemplation of death. We will so treat it. Certainly there is ample evidence in the record upon which the District Court could have based that specific finding.

The judgment of the court below is affirmed.

[fol. 88] JONES, Circuit Judge, concurring:

I concur in the affirmance of the judgment of the District Court for the following reason.

Where a settlor makes an *inter vivos* transfer of property with the remainders over to a class none of whom is in being at the time of the transfer and provides that, upon ultimate failure of the class, the property shall pass as the settlor may by will appoint, it is at least as reasonable to infer that the property will ultimately pass according to the settlor's appointment as it is to infer that it will pass by virtue of the transfer to then nonexistent remaindermen. In such circumstances, I fail to see how the taxpayer can be thought to have overcome the presumptive correctness of the Commissioner's determination that the transfer, when made, included a gift of the corpus in remainder to

take effect in possession or enjoyment at or after the transferor's death by virtue of his appointment.

That rules the instant case. The facts here show that the settlor made an *inter vivos* transfer of property, reserving to herself a life estate (the transfer antedated the Joint Resolution of 1931), with succeeding life estates in her two minor and unmarried daughters and remainders over in the corpus to the descendants of the daughters or either of them with the further provision that, in the event of the death of both daughters without leaving surviving descendants, the corpus should be paid to such persons as the settlor should by will appoint.

A true Copy:

Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 89] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1942

No. 8291

FIDELITY-PHILADELPHIA TRUST COMPANY AND ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased, Appellants,

vs.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue

Present: Biggs, Magruder and Jones, Circuit Judges.

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court, John Biggs, Jr., Circuit Judge.

May 15, 1944.

Endorsements—Order Affirming Judgment. Received & Filed May 15, 1944. Wm. P. Rowland, Clerk.

[fol. 90] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Harriet G. Humphrys, Deputy Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellants, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of Fidelity-Philadelphia Trust Co., et al., Exrs. Est. Anna C. Stinson, Deceased, Appellants, vs. Walter J. Rothensies, Individually and as Collector of Internal Revenue, No. 8291, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 27th day of June in the year of our Lord one thousand nine hundred and forty-four and of the, Independence of the United States the one hundred and sixty-eighth.

Harriet G. Humphrys, Deputy Clerk of the U. S. Circuit Court of Appeals, Third Circuit (Seal).

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the question whether the entire value of the corpus of the trust at the time of decedent's death should be included in the decedent's gross estate. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .

FIDELITY-PHILADELPHIA TRUST COMPANY, and ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased,

Petitioners,

v.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue for the First District of Pennsylvania,

Respondent.

PETITION

FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

C. RUSSELL PHILLIPS,
MONTGOMERY, MCCRACKEN, WALKER & RHOADS,
Attorneys for Petitioners.
1421 CHESTNUT STREET,
PHILADELPHIA 2, PENNA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Fidelity-Philadelphia Trust Company, and Robert A. Workman, Executors of the Estate of Anna C. Stinson, Deceased,

Petitioners,

v.

Walter J. Rothensies, Individually and as Collector of Internal Revenue for the First District of Pennsylvania,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Third Circuit entered May 15, 1944, affirming the decree of the District Court of the United States for the Eastern District of Pennsylvania entered January 8, 1943.

Opinions Below.

Neither the opinion of the Circuit Court of Appeals nor the opinion of the District Court are reported. Both are printed in this record.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938. The opinion of the Circuit Court of Appeals for the Third Circuit was filed May 15, 1944. The mandate has been stayed until July 29, 1944.

Questions Presented.

The questions are whether an irrevocable transfer in trust by the decedent on March 26, 1928, with life income and a remote power of appointment reserved was intended to take effect in possession or enjoyment at or after her death within the meaning of Section 302(c) of the Revenue Act of 1926 and, if it was, whether the entire value of the corpus should be included in decedent's gross estate for estate tax purposes or whether the value of intervening estates should be deducted.

Summary Statement.

On March 26, 1928, Anna C. Stinson created an irrevocable trust of about one-seventh of her property. By the trust she reserved the income to herself for life, then to her two daughters for life and upon the death of each daughter to pay the principal to her then living descendants. There were cross remainders and in case both daughters died without descendants the principal was to go as settlor should appoint by will, and in default of appointment to four named charities.

When settlor created the trust she was a widow forty-five years old and in good health. Her daughters were aged ten and twelve years. She died suddenly of heart disease over six and one-half years later on November 17, 1934, at the age of fifty-one. Following audit of the estate tax return, the value of the trust property was included in her gross estate and this suit is brought to recover the additional estate tax thus paid. The trust was found not made in contemplation of death.

The District Court gave decision for the defendant on the ground that the trust was testamentary in character. The Circuit Court of Appeals for the Third Circuit affirmed on the ground that the retention of the power of appointment by will held in suspense the ultimate disposition of the fund until settlor's death and that under the Hallock case the whole value of the trust must be included in the gross estate.

The will contained a provision that if both daughters died without descendants the estate was to go to her brothers and sister for life and then to four charities absolutely. Both courts ignored the plaintiff's additional contention that if the reservation of the power of appointment over the remote remainder, valued on the evidence at 1.25% of the principal, was sufficient to color

the entire trust as testamentary, its exercise with substantial entirety to charity was sufficient to warrant a charitable deduction in the same measure.

Reasons for Granting the Writ.

The decision is stated to rest upon the Hallock case[1]. In that case (or more accurately in those cases) the settlor provided that if the life beneficiary predeceased him the principal should come back to himself and this possibility was not dissolved until his own death before the life tenant. In the case at bar there is no possibility that the principal or any interest therein (other than the reserved life estate) could ever come back to the settlor and her testamentary power of appointment had substantially no value because of the intervening life estates to the two daughters and the absolute remainder to their descendants. The Hallock case is therefore, on its facts quite different. The only common elements are found in the so-called "string" retained by the settlor. In the Hallock case this reservation was substantial and was to the settlor himself. In this case the settlor kept nothing for herself except her life estate which is to be disregarded as an element in the case if May *v.* Heiner[2] is to be regarded as law. Therefore petitioners submit the decision in this case is contrary to the Hallock case and to May *v.* Heiner.

There was undisputed evidence in this case that on the date of the settlor's death the value of the remainder after the deaths of the two daughters was 14% of the

[1] Helvering *v.* Hallock, 309 U. S. 106 (1940).
[2] May *v.* Heiner, 281 U. S. 238 (1930).

principal, and its value after exhaustion of the possibility that the line should die out was 1.25% thereof. In all the "Hallock" cases the value of the intervening life estate was deducted. The regulations, following Treasury Decision 5008 amending them after the Hallock case, provide for the deduction of the "outstanding" life estate. The life estates of the two daughters were "outstanding" on her death or else her own life estate was outstanding. There was no moment when one or the other was not "outstanding". The value of one or the other ought to be deducted if the result of the Hallock cases is followed. For this further reason it is submitted the decision in this case is contrary to the Hallock cases.

While the decision in this case purports to recognize that May *v.* Heiner and Hassett *v.* Welch[2] are valid decisions, in effect it is contrary to them because it states (R. 86) "Since the disposition of the estate was held in suspense until her (settlor's) death that event compels the imposition of the tax." In fact all but a very remote and almost valueless interest was irrevocably disposed of by the trust indenture before settlor died. Therefore petitioners submit this decision is contrary to May *v.* Heiner and Hassett *v.* Welch.

The decision in this case purports to recognize May *v.* Heiner and Hassett *v.* Welch but contains the statement in the opinion "since the disposition of the estate was held in suspense until her (settlor's) death that event compels the imposition of the tax". In effect, therefore, the court has disregarded May *v.* Heiner and Hassett *v.* Welch and is inconsistent with the cases of

New York Trust Company et al v. United States, 51 Fed. Sup. 733 (1943), and
Helvering v. Proctor, 140 Fed. (2d) 87 (1944) C. C. A. 2.

The case of New York Trust Company *v.* United States was decided by the Court of Claims on October 4,

[2] Hassett *v.* Welch, 303 U. S. 303 (1937).

1943, and holds that the reservation of a life interest is not sufficient to render a trust taxable to the estate of the settlor where the trust was created before the time of the joint resolution. The Court of Claims expressly recognizes May *v.* Heiner and Hassett *v.* Welch and is, therefore, inconsistent with the decision in this case.

The Proctor case is to the same effect and is noteworthy in that its facts correspond to the case at bar except that the settlor had a power of disposition on failure of the family line without express reservation whereas in the case at bar there was an express reservation.

A further reason for granting the petition is that the present case is entirely out of harmony with a number of decisions by this Court which outline the application of the gift and estate taxes. The case of

Estate of Sanford v. Commissioner, 308 U. S. 39 (1939),

holds that the gift tax supplements the estate tax.

Rasquin v. Humphreys, 308 U. S. 54 (1939).

This case holds that the retention of a remote possibility of recovering the trust property will not free it from the gift tax.

Humes v. U. S., 276 U. S. 487 (1928).

This case holds that a charitable remainder effective only under remotely possible circumstances will be disregarded.

Smith v. Shaughnessy, 318 U. S. 176 (1943).

In this case a settlor placed property upon trust for his wife with remainder to others subject to the provision that if the wife predeceased the grantor the property should come back to him. This Court held that only the life estate to the wife was a valid gift and only that should be taxed.

Robinette v. Helvering, 318 U. S. 184 (1943).

In this case there was a trust with a reversion to the settlor after the death of a daughter without issue. This Court held the entire principal subject to gift tax, the remote reversion being too small to be considered.

It is submitted that a remotely possible reversion or power of control if disregarded for gift tax purposes and if disregarded for the purposes of a charitable deduction should also be disregarded for estate tax purposes. The present case cannot be reconciled with the decisions of this Court cited above.

Lastly, it is the opinion of the petitioners that the questions involved in this case are of importance in the administration of the federal estate tax. The importance of the question is demonstrated by the number of cases which have come before the Tax Court and resulted in decisions favorable to the taxpayer on facts which are not essentially different from the case at bar except that there was not reserved to the settlor any life interest in the income. Under May *v.* Heiner and Hassett *v.* Welch this circumstance is to be disregarded in this case. These cases are as follows:

Estate of Lester Hoffheimer v. Commissioner, 2 T. C. No. 99 (1943);

Estate of Mabel H. Houghton v. Commissioner, 2 T. C. No. 110 (1943);

Estate of Ellen Portia Goodyear v. Commissioner, 2 T. C. No. 112 (1943);

Estate of Tully C. Estee v. Commissioner, T. C. Memorandum (P-H Memorandum Service Par. 43,420) (1943);

Estate of Smith M. Flickinger v. Commissioner, T. C. Memorandum (P-H Memorandum Service Par. 43,455) (1943).

Therefore, petitioners submit that the Court may well take jurisdiction of this case,

(1) because of its importance as announced in the case of

Helvering v. Safe Deposit and Trust Co., 316 U. S. 56 (1942);

(2) because this decision is inconsistent with the Hallock case where the value of the reverter alone was included in the taxable estate;

(3) because there is a conflict among the Circuits demonstrated by the Proctor case;

(4) because this decision is contrary to the decisions of this Court in May *v.* Heiner and Hassett *v.* Welch; and

(5) because the decision stands upon a remote interest held too distant for consideration for gift tax purposes in Robinette *v.* Helvering and in Humes *v.* U. S., for estate tax purposes.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .

FIDELITY-PHILADELPHIA TRUST COMPANY and ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased,

Petitioners,

v.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue for the First District of Pennsylvania,

Respondent.

PETITIONERS' BRIEF

IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT NO. 8291.

C. RUSSELL PHILLIPS,

WALTER A. RHOADS,

INDEX TO BRIEF.

INDEX TO CASES.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938. The opinion of the Circuit Court of Appeals for the Third Circuit was filed May 15, 1944. The mandate has been stayed until July 29, 1944.

STATEMENT OF THE CASE.

This action is to recover approximately $13,000. of Federal estate taxes on the estate of Anna C. Stinson paid to the Collector pursuant to the Commissioner's deficiency letter and alleged not to be due. The question is whether the assets of a trust valued at $84,433.49 on the date of decedent's death should be included as part of her estate and if so, whether the value of outstanding estates should be deducted. The facts are briefly as follows:

Anna C. Stinson, a widow, died November 17, 1934, at the age of 51. On March 26, 1928, she executed a certain irrevocable trust indenture with the Fidelity-Philadelphia Trust Company and one of her brothers as

trustees and placed under it assets which on the date of her death had a value of $84,433.49 comprising about one-seventh of all she owned. A copy appears at page 7a of the Record. By this trust indenture she reserved the income to herself for life and at her death the income was to go to her two children, Florence and Nancy, during their respective lives, and upon the death of each daughter the corpus was to be distributed to each such daughter's descendants *per stirpes*. There were cross remainders providing that in case either daughter died without leaving descendants the corpus should be added to the other daughter's share. It was then provided that in the event both daughters died without leaving descendants the principal should be paid in such manner as the settlor should appoint by will.

Mrs. Stinson had been left a widow some years before when her husband was killed in a fall. Her older brother, Robert A. Workman one of the plaintiffs, had been advising her in investment matters, and suggested this trust to secure some diversity in the management of her affairs. At the time the trust was created, on March 26, 1928, Mrs. Stinson was 45 years of age and had two daughters aged 10 and 12 years. She was in good health, never having been ill. Her four brothers and sisters were and are all living. The whole family was a long lived one. Yet six and a half years later on November 17, 1934, she died suddenly of heart disease leaving the two daughters, one almost 17 and the other 18 years of age.

Reference to this trust was included on the estate tax return but the assets were not included in the taxable estate. Later the Commissioner assessed a deficiency, which was paid, and this suit subsequently brought by the executors to recover the amount of additional tax arising by reason of the inclusion of the assets of the trust in the estate.

The case was tried before Honorable J. Cullen Ganey in the Eastern District of Pennsylvania on February 16, 1942. Most of the facts were stipulated. The docket entries show the stipulation was filed February 12, 1943. In fact it was offered in evidence at the trial (R. 37a). The practice of the clerk in entering exhibits on the docket only upon appeal is somewhat misleading. In fact this stipulation was before the trial judge.

There is no dispute that when the trust was drawn Mrs. Stinson had these two daughters to whom she gave life estates following her own, and that when she died they were both living. The value of a remainder interest in the trust after their lives had, on the date of Mrs. Stinson's death, a value of 14.030% of the $84,433.49 face value of the assets in the trust, or a value for such a remainder of $11,846.02 (R. 34a). This was stipulated. The remainder, however, could become subject to the power of appointment only in the event the two daughters died without descendants. Evidence was introduced to show that the value of this remote interest on the date of Mrs. Stinson's death was 1.24% of $84,433.49 (R. 53a) or $1,046.97. There was no dispute over this evidence.

The trial court filed its decision January 8, 1943, holding that the transfer was not made in contemplation of death but holding that under Sec. 302 (c) of the Revenue Act of 1926 the trust was intended to take effect at or after the grantor's death. The court expressly concluded that the whole value of the trust assets should be included in the gross estate and made no mention of any reduction by reason of the intervening life estates.

From this decision the executors appealed to the Circuit Court of Appeals for the Third Circuit. That court affirmed by decision rendered May 15, 1944, and this petition for certiorari is filed to that decision

SPECIFICATIONS OF ERRORS URGED.

Petitioners urge the following errors:

(1) The court below erred in holding the trust was intended to take effect in possession or enjoyment at or after death within the meaning of Sec. 302 (c) of the Revenue Act of 1926 as amended.

(2) The court below erred in failing to deduct from the value of the assets of the trust the value of the irrevocable estates of settlor's daughters and of the remainders to their descendants.

SUMMARY OF ARGUMENT.

Petitioners' position is that the retained interest in this trust is so small that it should be disregarded. It was valued at 14% after the death of settlor's two daughters and 1.24% after failure of the whole line. The retained interest materializes, if ever, only when the whole line fails if it does so upon the death of the children.

For gift tax purposes, such a retained interest is held too remote to relieve the transfer from tax. A charitable remainder in such an event is held too speculative to value. It is therefore contended such a diluted interest should not color the whole trust with an intent that it take effect only at or after settlor's death.

Lastly, the Hallock case with its very valuable retained interest included only that retained interest in the taxable estate and excluded all the rest. If anything is included here, only that almost valueless retained interest should be considered.

ARGUMENT.

1. The transfer by this trust does not come within Section 302 (c).

The question considered under this heading is whether or not the transfer in trust of March 26, 1928 comes within

Section 302 (c).* As that Section stood when the trust was created, it read as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated——
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> * * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Section 302 (c) as it stood on the date of decedent's death on November 17, 1934, is set forth in the margin. The portion thereof appearing in italics was added by the

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* Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States.

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

joint resolution of March 3, 1931, as amended by the Revenue Act of 1932.

The notes of testimony have been certified notwithstanding they have largely to do with the question of whether the gift was made in contemplation of death. This has been done, because it is felt that the Circuit Court of Appeals as well as the trial judge, have wholly misunderstood the purpose intended to be accomplished by the trust of March 26, 1928.

Section 302 (c) combines in one sentence the two thoughts of gifts in contemplation of death and those intended to take effect in possession or enjoyment at or after death. It is significant that the word "intended" is attached to the clause applicable to gifts intended to take effect in possession or enjoyment at or after death. The application of 302 (c) depends upon the intent of the decedent in this case. Her intent, of course, is primarily to be determined from the instrument itself, but if there is any doubt on the subject the surounding circumstances may have a bearing. For this reason the testimony dealing with those circumstances has been printed.

In her trust (expressly irrevocable) Mrs. Stinson requires the trustees to pay the income to herself for life and thereafter "to pay the said net income in equal shares to Florence V. Stinson and Nancy C. Stinson, daughters of the said settlor, during their respective lives." It was then provided that as each daughter should die her share of the principal should be paid to the daughter's living descendants *per stirpes* absolutely. In the event a daughter died leaving no descendants, her share of principal was to go to the benefit of the other daughter and her descendants. The only reversionary feature in the trust appears in the following provision (p. 15a):

> "* * * in the event of the death of both daughters of said settlor without leaving descendants

surviving, to pay over the corpus or principal of the within created trust estate to such person or persons and upon such estate or estates as the said Settlor shall by her last Will and Testament direct, limit and appoint, and in default of such appointment then to assign, transfer and pay over the said corpus or principal of the within created trust estate to:" the Presbyterian Home for Aged Couples and Aged Men; the Presbyterian Orphanage; the Presbyterian Hospital; Bryn Mawr College; and the Philadelphia Home for Incurables.

Mrs. Stinson retained the life income for herself. If such a trust were written today, doubtless this feature alone would require including the assets at some values as a part of her estate. However, the trust was created March 26, 1928, before Section 302 (c) was amended by the joint resolution of March 3, 1931. At that time the reservation of a life estate in the assets of a trust was not sufficient to make the principal taxable to the settlor's estate. This Court had decided a number of cases to that effect.

May v. Heiner, 281 U. S. 238 (1930).

In this case the settlor provided that the income from the trust should be paid to her husband for life and then to herself for life with remainder to their children. It was held that the principal of the trust was not taxable to the settlor's estate.

Following this decision, two other decisions along the same line were handed down.

Burnet v. Northern Trust Company, 283 U. S. 782 (1931);

McCormick v. Burnet, 283 U. S. 784 (1931).

The day after these two decisions were handed down the joint resolution of March 3, 1931, was adopted, pro-

viding that the retention of income by a settlor made the principal of the trust part of the settlor's estate for estate tax purposes.

It has recently been decided that the joint resolution is not to be given retroactive effect and is not to apply to trusts created before its date of passage.

Hassett v. Welch, 303 U. S. 303 (1938).

In this case the settlor in 1924 created a trust, the income to be paid to himself for life and after his death to certain nephews and nieces, and upon the death of the survivor of them the principal was to be distributed to their living issue. This Court held that Congress did not intend the joint resolution to be retroactive, and this decision was based largely on comments made on the floor of Congress at the time of its passage. The joint resolution was passed under a suspension of the rules. It did not go to any committee for hearing. Therefore, comments upon the floor are the only clue available to the intention of Congress.

Section 302 (c) of the Revenue Act of 1926 was amended by the joint resolution of March 3, 1931, so as to require inclusion of the assets of a trust where the life estate was reserved to the settlor. The section was further amended in 1932 and as amended was retained in the Revenue Act as adopted in 1934. In all of these Revenue Acts there was included a provision taxing a transfer intended "to take effect in possession or enjoyment at or after death". Reservation of a life estate without more does not constitute taking effect at or after death under the statute, according to the decision in May *v.* Heiner.

Therefore, if May *v.* Heiner and the cases following it, including Hassett *v.* Welch, are to be considered law, the circumstance that Mrs. Stinson reserved to herself the income for life must be disregarded as an indication that the trust was intended to take effect at or after death.

After her own death Mrs. Stinson created vested estates in her two daughters for life. They were normal, healthy girls of the ages of 10 and 12 years when the trust was created, and when Mrs. Stinson died in 1934 one of them was almost 17 and the other 18 years of age. They both testified in court. Both are married. One of them had one child and the other two children as of the time of the trial.

There is an absolute gift of the principal of this trust to the descendants of the daughters on the date of the death of each daughter. The death of Mrs. Stinson had no effect at all upon this trust except, of course, the termination of her own life interest which under the decided cases has no bearing. The daughters did not receive their interests by reason of Mrs. Stinson's death. They had them all the time. No reversionary provision in the trust instrument could take them away. The entire fee was disposed of by the trust, and no part of it was retained by the settlor beyond her own life interest.

The contention was advanced before the trial judge and again in the Circuit Court of Appeals, that the whole family might have died out before Mrs. Stinson's death and thus the trust might entirely have failed. Careful thought will indicate that this is not a possibility. Even if the whole family should die out this circumstance would not increase the life estate reserved by the settlor and she would have no power of disposition other than that reserved by way of power of appointment under her will and her faiiure to exercise the power would leave the entire residue in the four named charities.

This possibility is, therefore, not an actuality. It is an actual fact in this case that under no circumstances whatever could anything ever have come back to this settlor beyond the life estate which she reserved. Once it is determined that May *v.* Heiner and like cases are still the law and that the joint resolution does not apply to this case, it is clear that nothing can render this trust

or any part of it, taxable as part of the settlor's estate unless it be a mere circumstance that she did reserve a power of appointment effective only under very remote possibilities. These possibilities could still occur and whether or not they do occur has no relation whatever to the settlor or to the time of her death.

The Government depends, and the court below relied upon the case of

Helvering v. Hallock, 309 U. S. 106 (1940).

This case will be discussed more at length later on. In it the settlor made a trust for the benefit of his wife, giving her the income for life. It was then provided that if the settlor survived his wife, the principal should come back to him. There was thus no absolute gift of the principal to anyone, and a very real possibility that the husband might survive the wife. Only the husband's death made the estate created by the trust indefeasible.

The case at bar is very different. Here absolute estates have been created to the uttermost limit in this family. Only in the event the whole family dies out can there be any further disposition by the settlor, and even that event does not terminate in any one else any estate created by the trust. Certainly the death of the settlor has no effect one way or the other. If the whole family had died out the settlor would have had a life estate in the income with a power to appoint the principal by will at her death. She would not have received the property back free of the trust. If at some time hereafter the whole family should die out, the principal might become subject to the terms of the decedent's will, but that possibility is extremely remote and is almost valueless. It is now of even less value than it was when the decedent died because there are now several grandchildren which was not the case then.

The contention is now made that the Hallock case should be extended to cover a case where there is any

possibility of control at all no matter how remote. If the Hallock case was intended to have that meaning, it is, of course, no longer possible that a trust *inter vivos* shall ever be excluded from the settlor's estate for tax purposes. It is quite beyond human possibility to create a perfect *inter vivos* trust without any possibility that either the settlor or her will should thereafter at some time control the disposition of the principal.

Let us suppose that Mrs. Stinson provided that in the event her entire family should die out that the fee should go to the United States Government. It is hardly to be supposed that there is any human organization on earth which we would regard as more permanent than the United States Government. Nevertheless, it is conceivable that our Government would not be present or in existence to receive the remainder when it should fall in. There are places on earth today where three years ago this Government held sway and now no longer does, inconceivable as this may seem to a patriotic citizen. As a matter of cold philosophy, it is impossible for a settlor to completely divest himself of any piece of property on trust with one slight exception. In the event the trust were for the sole purpose of destroying the property, it may be imagined that there could be no reverter of any kind. In no other case is it possible to draw a perfect trust and even in that one exception it may be imagined that the trustee might fail to destroy the trust property, and thus a reverter might take place.

The possibility that the reserved power should ever be exercised in the case at bar is about as remote as is to be found in the ordinary human family. Had Mrs. Stinson had ten children instead of two, the possibility would have been even more remote, although it is by no means an established fact that the members of a large family are more likely to perpetuate a family line than are the members of a small family.

The trial judge did not enter into any discussion of his reasons for reaching the result in this case. There is no decided case which thus advances the Hallock case. The Circuit Court of Appeals went to greater lengths to justify its decision. It purports to recognize May *v.* Heiner and the cases following it, but states that it is compelled by the Hallock case to give decision against the taxpayer. It states (R. 86a): "Since the disposition of the estate was held in suspense until her (settlor's) death, that event compels the imposition of the tax." This sentence is of course, quite incorrect. Nothing whatever happened upon the occasion of the decedent's death except the ending of her own life estate and the beginning of the life estates of the daughters. The disposition of the trust estate was not in the slightest affected. No gift which had hitherto been given by the trust was rendered more certain by the death of the settlor. The day after her death the same possibility existed as it did the day before her death, that if the family ultimately dies out the principal may go to charities under the will. This possibility was more remote the day after her death than it was the day before and it becomes more remote as each day goes by because the value of the intervening life estates of the daughters each day becomes less and the absolute disposition to healthy grandchildren day by day becomes more of a certainty.

The decision in the Hallock case is really a decision in five cases. In three of these the decedent created a trust under a separation agreement to pay the income to his wife for life with the provision that if she should die, the property should revert to the settlor if he should be living. In one of the cases the decedent by an antenuptial agreement made the same provision for reversion in the event his wife should predecease him. In the fifth case there was merely a provision in a trust that the income should be paid to the settlor's wife for life and upon her death to the settlor himself if he should be living.

All of these cases contain the common fact that the trust instrument called for a reversion direct to the settlor in the event he survived the life tenant. Only the settlor's death put an end to this reversion, and a majority of this Court held that this circumstance rendered the trust so much like a will that it was intended to take effect and would take effect only upon the death of the settlor, and that under Section 302 (c) some value should be included in the decedent's estate.

However, in each case the settlor did not survive, and at his death there was thus an outstanding life interest in the wife. The Government did not ask that the entire value of the trust assets be included in the estate of the settlor. It sought only to have the value of the remainder included. Only this remainder could have reverted. This question of values will be discussed later on.

The case most nearly identical with the case at bar is

Commissioner v. Kellogg, 119 Fed. (2d) 54 (1941) C. C. A. 3.

In this case the settlor by trust created in 1919, reserved the income for his life and then provided it should go to his wife for life, and upon the death of the survivor the principal was to go to the living children and the spouse of any deceased child. It was then provided that if all the children should die without issue or spouse the principal should go to the next of kin of the settlor.

At the argument it was contended that the gifts to the children were vested. The court held that they were contingent. It was also pointed out that there was a kind of undisclosed possibility of reverter. The settlor in the Kellogg case provided that in the event the children died without issue the principal should go to the next of kin of the settlor. The instrument did not contain any provision as to what should happen if there were no next of kin.

People do die without next of kin, and if there had been none quite obviously the reverter of the principal would have been to the settlor's estate. The draftsman of the instrument in the Kellogg case never thought of such a remote possibility.

Judge Biggs points this out in his opinion, page 57:

> "Upon the estates set up by the indenture of the case at bar, if the grantor had survived his wife, his children, their respective spouses, and their issue, and his own next of kin, the corpus of the trust would have reverted to him likewise by reason of the failure of the trust. In either event the trust would have returned to him not by specific words contained in the indenture, but by failure of the trust * * *. No *inter vivos* trust can ever be made that would not be includible in the grantor's estate for the purpose of taxation if the petitioner's view prevails."

The court declined to overrule May *v.* Heiner and declined to extend the provisions of the Hallock case.

The Kellogg case is substantially identical with the case at bar. There is one possible difference. In the Kellogg case the trust indenture provided that in the event of the failure of the trust the principal should go to the settlor's next of kin. In the case at bar this remote possibility was covered by a provision that if the whole family died out the property should go as the settlor should appoint by will. In the Kellogg case there was no provision as to what should happen if all the provisions of the trust should fail. As the court pointed out, there would be a reverter to the settlor. While the court had no occasion to say so, in the Kellogg case it is clear that if this should have occurred the property would have passed under the settlor's will. In the case at bar Mrs. Stinson said that if there should be a total failure the trust should pass under her will, and then she appointed in her will the four charitable institutions.

The case at bar is quite indistinguishable on any important fact from the Kellogg case because there is no real difference between reserving a power of appointment if the whole line dies out and making no provision whatever under those circumstances, in which condition the settlor would have the power by operation of law.

The Circuit Court of Appeals in the present case states (R. 84):

> "In the case at bar Mrs. Stinson did retain a string or tie, whereby, upon the happening of certain contingencies, she could have regained control of the corpus of the trust at least to the extent of making it subject to testamentary bequests."

It should be said that she could not regain control of the corpus for any other purpose whatsoever under any circumstances. The court then went on to state that the retention of this "string" compelled conclusion of the trust under the Hallock case. The Circuit Court of Appeals distinguished the Kellogg case by a curious and it is submitted, unsound, process of reasoning. It pointed out that when Mrs. Stinson made this trust in 1928 she did not have any grandchildren, whereas in the Kellogg case, the trust was created when there were grandchildren. The court then goes on to state (R. 86):

> "The rights of the beneficiaries other than those of the grantor's daughters could not become absolute until the death of the grantor and had to remain contingent or conditional at least until the happening of that event."

This sentence is completely in error. The death of the settlor had not the slightest effect upon the question of whether or not her grandchildren should receive the absolute remainders given by the trust. The only possible circumstance affecting their right to take is whether or not they shall survive the settlor and their own parents.

These grandchildren were not born when settlor died. Clearly her death did not render their enjoyment more or less certain save only that her death terminated her own life estate, which under May *v.* Heiner and Hassett *v.* Welch, is not a controlling factor. It is submitted that the Circuit Court of Appeals has created for itself a picture of the possibilities which is entirely erroneous and has attributed to the death of the decedent—settlor, an effect which it did not have and never could have.

The Government has contended a number of times unsuccessfully, that the Hallock case overrules May *v.* Heiner. Such cases are:

Helvering v. Proctor, 140 Fed. (2d) 87 (1944), C. C. A. 2;
Helvering v. Washington Trust Co., 140 Fed. (2d) 87 (1944) C. C. A. 2.

These cases were appeals by the Commissioner from the Tax Court. In the Proctor case the decedent executed two deeds of trust in 1923 reserving the income to herself for life, then on her death to divide the principal into two parts, one to her son absolutely, and the other to pay the income to the son for life with remainder on his death to her grandchildren then living per capita. If the son predeceased his mother the trustees were to distribute the principal upon her death among her living grandchildren per capita. If there were none, to the "heirs at law or legal representatives" of her son and daughters. The other deed was in like terms except in favor of a daughter.

In the Washington Trust Company case there were two deeds, one in 1923 and the other in 1929, the income during settlor's life to be paid to "anyone whom I should designate", and upon his death to pay the income to his wife for life "as she may request" and on her death, or his death, if he survived her, to pay the income to his children then living with survivorship in case any child

died without issue. If there were issue, a child's share should go to his issue.

The Circuit Court of Appeals for the Second Circuit discusses at length whether or not the Hallock case reverses May *v.* Heiner and concludes that it was not the intention of this Court to accomplish that result.

New York Trust Company v. United States, 51 Fed. Supp. 733 (1943) Court of Claims.

In February, 1924, the decedent executed an irrevocable trust instrument, reserving the income to herself for life and at her death principal was to be divided into shares, the income to be paid to her three children if living and the principal ultimately to their children appointed by them or their heirs. The action was to recover estate taxes paid by reason of the inclusion of the principal of the trust. The court discussed whether or not May *v.* Heiner and Burnet *v.* Northern Trust Company were overruled by the Hallock case and held that they were not. Full recovery was allowed.

A great deal has been written about whether May *v.* Heiner was properly decided or not. It is not within the province of this brief to go exhaustively into that question. The fact remains that it was decided by this Court in 1930 and represented an interpretation of the tax law which had been widely adopted. Undoubtedly many trusts were set up in reliance upon that doctrine and doubtless some after the decision and before the passage of the joint resolution.

The tax Court also holds that the Hallock case does not overrule May *v.* Heiner.

Bradley v. Commissioner, 1 T. C. 518 (1943).

It has been stated recently by this Court that the gift tax supplements the estate tax. The two statutes are stated to be in *pari materia.*

Estate of Sanford v. Commissioner, 308 U. S. 39 (1939);

Rasquin v. Humphreys, 308 U. S. 54 (1939).

These two cases were gift tax cases. In the Sanford case the settlor created a trust in 1913 before the gift tax statute was passed. In 1924 after the effective date of the gift tax law he renounced a reserved power to modify the trust. Shortly thereafter the settlor died and it was contended that the renunciation was tantamount to a gift.

In the Humphreys case a trust was created in 1934 after the gift tax act of 1932 was imposed and in it he reserved a power to change the beneficiaries and otherwise alter the trust. The Commissioner claimed gift taxes in both cases admitting that he could not succeed in both. This Court held that the retention of the power to change prevented the gift from being complete in the Humphreys case. In the Sanford case it was held that a gift while originally incomplete, became complete upon the renunciation of the reserved power. In referring to the Gift Tax Act Mr. Justice Stone states at page 44:

> "There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. Burnet *vs.* Guggenheim, *supra,* 286. * * *"

A very helpful case is that of

Smith v. Shaughnessy, 318 U. S. 176 (1943).

This case was decided February 15, 1943, and involved the liability of a grantor for gift tax in a case very much

like Helvering *v.* Hallock where the grantor gave certain property upon trust to his wife, with remainder to others, but subject to a provision that if the wife predeceased the grantor, the property should go back to him. The Government conceded that the reverter after a single life could be valued, and this Court held that only the complete gifts should be subject to gift tax. The value of the reversionary interest was to be omitted. While this case is not conclusive, it affords grounds for hopeful expectation that this Court may reaffirm the decision in the Hallock case excluding the value of irrevocable life estates in determining estate tax liability.

Robinette v. Helvering, 318 U. S. 184 (1943).

This case was also decided February 15, 1943, and differs from the Smith case in that the reversion occurred after the death of a daughter without issue. At page 188 this Court distinguishes the Smith case decided the same day:

> "In this case, however, the reversionary interest of the grantor depends not alone upon the possibility of survivorship but also upon the death of the daughter without issue who should reach the age of 21 years. The petitioner does not refer us to any recognized method by which it would be possible to determine the value of such a contingent reversionary remainder. It may be true as the petitioners argue that trust instruments such as these before us frequently create 'a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously'."

The Court therefore held that the entire trust was taxable **for gift tax purposes**. This was done because the remainder was so small. It is submitted that the converse proposition contended for by the petitioners

here should be accepted, namely, that the whole trust should be exempt from estate tax liability, because the possible reverter is too remote for practical consideration.

Humes v. U. S., 276 U. S. 487 (1928).

In this case the question was whether a remote charitable remainder could be valued so as to be used as a deduction for estate tax purposes. The will gave one-half of the residue to trustees for a niece to pay the income to her and to pay the principal in portions at the age of 30 and 35 years, and the balance upon reaching the age of 40. The other half was given in trust for a brother in the same way. It was provided that if the beneficiaries should die without issue before the age of 40, the balance was to go to the charities. The Court of Claims held that it was possible to value these remainder interests but this Court in an opinion by Justice Brandeis reversed. At page 494 he states:

> "Neither taxpayer, nor revenue officer—even if equipped with all the aid which the actuarial art can supply—could do more than guess at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character."

Taking the gift tax cases and the Humes case together, the following comments are in order. The reserved right to dispose of the property in the trust in the case at bar could be effective only in the event the entire family should die out.

On the date of the decedent's death this was an extremely remote possibility. There were almost 99 chances out 100 that it would not happen at all. In the Humes case under similar circumstances a remote charitable bequest was held too remote for consideration and therefore, no deduction was allowed. In the gift tax cases the

reserved power frees the subject of the gift from liability for gift tax and leaves it exposed to the estate tax but if the reserved power is very remote it will be disregarded. This happened in the Robinette case.

It is most respectfully and earnestly submitted that a contingency too remote to be considered for the purposes of a charitable deduction; too remote to be considered an element in escaping the gift tax, should likewise be considered too remote to expose the principal of the trust to estate tax liability under the Hallock case.

The Tax Court has decided a number of cases recently wherein a remote possibility of reverter has been held not to bring the assets of a trust within the rule of the Hallock case.

Estate of Lester Hoffheimer, 2 Tax Court No. 99, (1943);

Estate of Mabel H. Houghton, 2 Tax Court No. 110, (1943);

Estate of Ellen Portia Goodyear, 2 Tax Court No. 112 (1943);

Estate of Tully C. Estee v. Commissioner, T. C. Memorandum (P-H Memorandum Service, Par. 43,420) (1943);

Estate of Smith M. Flickinger, T. C. Memorandum (P-H Memorandum Service, Par. 43,455) (1943).

The basic reason for these cases is given in the Hoffheimer case at page 16 of the opinion:

> "In the instant case not the death of any beneficiary or beneficiaries in being, but the complete failure of decedent's whole line would alone work a reversion in him under the terms of either trust. In neither trust is the vesting of the remainder . . possession, by final determination of the individual or class which should take, made with reference to decedent's death."

The situation in the case at bar is exactly the same. Whether or not Mrs. Stinson's will shall finally dispose of the principal of the trust (to charities) depend not at all on her own death, but on the failure of the line in the future. It can still happen.

2. If the transfer is to be included the value of the outstanding estates should be deducted.

As previously indicated, the decision of the trial judge and the affirming decision of the Circuit Court of Appeals purport to be based entirely on the Hallock case. It is interesting that in the Hallock cases the entire value of the trust assets was not included for estate tax purposes. In every one of those decisions the first life estate was outstanding at the time of the death of the settlor. The Commissioner, in the first instance, included the full value of trust corpus in each deficiency notice and on appeal a reduction by the amount of the value of the outstanding life estate was conceded on pages 2, 6 and 7 of the Government's brief and the deficiency as finally computed by the Board of Tax Appeals allowed a reduction by the life estate.[1]

[1] The writer of this brief has not checked this result from the Board records, but relies upon the assertion of Everett in an article entitled Valuation of a "Possibility of Reverter" under the Hallock Case, as reported in 18 Taxes 611, 612 (1940). In view of the concession in the Government's brief on appeal there would appear to be no doubt of this.

One of the cases covered by the opinion in the Hallock case was No. 399, Bryant *v.* Helvering. The facts of it are discussed at page 116 of the Hallock decision. That trust provided for payment of the income to the wife during her life and upon her death "to the said grantor, if he should survive her". The wife survived the husband and the question was what effect the trust should have upon his gross estate. Mr. Justice Frankfurter states at page 116:

> "* * * The Board of Tax Appeals allowed the Commissioner to include in the decedent's gross estate only the value of a 'vested reversionary interest', which the Board held the Grantor had reserved to himself. On appeal by the taxpayer the Circuit Court of Appeals sustained this determination."

At the end of Mr. Justice Frankfurter's opinion, on page 122, there appears the following as the last words of his opinion:

> "In No. 399, the judgment is affirmed."

There would seem to be no doubt that in the Hallock case this Court affirmed the principle that only the reversion could be included in the gross estate. Only the reversion was subject to return to settlor, and it was only the reversion which passed beyond the reach of the settlor or his estate by the accident of his death before that of the life tenant.

Following the Hallock decision the Treasury Department amended the Regulations. This amendment took the form of Treasury Decision 5008, approved September 19, 1940, amending Regulation 80 (1937 Ed.). It is long and the portion of it applicable to the subject of valuation is as follows:

> "* * * Thus, upon a transfer by a decedent of property in which an estate for life is given to one

and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate * * *."

It would seem that the highest authority in the administrative branch of the Government, namely the Secretary of the Treasury, by whom the Regulations are promulgated, has decided that only the interest retained by the decedent should be valued.

The foregoing Regulation still stands as the opinion of the Secretary of the Treasury as to how the gross estate is to be determined in this respect, and the Regulation says that the value of the outstanding life estate is not to be included. In the Hallock case the value of the life estate was not included and in the Regulation the Treasury Department says it is not to be included. What higher authority on the subject could be secured, it is difficult to say.

Nevertheless in the case at bar the Government has contended for the inclusion of the entire value of all of the assets in the trust on the date of Mrs. Stinson's death. Judge Ganey deliberated on the case for eleven months, and his opinion does not disclose any consideration of this point.

The Circuit Court of Appeals, after rejecting the petitioner's contention for deduction of the value of the other outstanding assets, assigned its reason in the fol-

lowing sentences which are the sole explanation of its action:

> "Since the disposition of the estate was held in suspense until her death that event compels the imposition of the tax. The rights of the beneficiaries, other than those of the grantor's daughters, could not become absolute until the death of the grantor and had to remain contingent or conditional at least until the happening of that event."

It is of course, true that so long as the settlor lived no one else could enjoy this trust estate. That circumstance, however, does not render the trust a part of the settlor's taxable estate under May *v.* Heiner and Hassett *v.* Welch. Therefore, the mere ending of the settlor's life estate and the beginning of the next estate is not a critical factor. The Hallock case seems to indicate, and the regulations state, that "the value of the outstanding life estate is not to be included in determining the value of the gross estate * * *". There has been no time from the creation of the trust to the present moment when some life estate was not outstanding. Up to the time of the settlor's death her own life estate was outstanding and during that time it had a very substantiial value based on her life expectancy. The moment she died the life estates of her two daughters began and they have been outstanding ever since. Petitioners submit that the value of the life estates of the daughters ought to be deducted. If they are, this reduces the value of the principal to 14.030% which gives a value of $11,846.02 under the joint life table supplied by the Commissioner and stipulated in this case. The succeeding estates in remainder to the descendants of the children are not presently in a state of enjoyment. Petitioners submit that they are "outstanding". It is further submitted that even if the word "outstanding" as used in the regulations, refers only to an estate in course of enjoyment, then the regula-

tion is in error because there is no real reason for deducting the value of the estate presently being enjoyed and the next succeeding estate or estates which will follow upon its determination without recourse to anything the settlor ever did other than create the trust and die.

If the value of the remainders in the descendants of the two daughters is deducted, residual value is 1.24% of the trust of $1,046.97. This represents the opinion of the witness as to the value of Mrs. Stinson's power of appointment when she died leaving two living daughters.

It is respectfully submitted that this Court should not go beyond the rule laid down in the Hallock case, and should not override the regulations. Other cases on the subject are of interest.

Bradlee v. White, 31 Fed. Supp. 569 (1940), D. C. Mass.

This, like the case at bar, was an action to recover estate taxes paid by reason of the inclusion of the entire value of a trust in the decedent's gross estate. The decedent in this case created a trust in 1922, giving the income to his wife and upon her death the trust to revert to the grantor if he survived her, but if he did not, the trust was to go to the children. This case was almost the same as the Kellogg case on its facts and the court held that the value of the remainder interest held by the decedent should be included in his gross estate.

The court at page 570 states the question, which was presented on an agreed statement of facts, as follows:

> "The question is, therefore, whether the remainder interest should have been included in the gross estate of the deceased. * * *"

In view of these and many other cases where the Government has taken the position that only the remainder interest should be included in the gross estate, and in view of the Regulation expressly to that effect, it is sub-

mitted that the Government should not be permitted now to assert that its own regulation and the cases as well are mistaken.

It is respectfully submitted that a petition for certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 263.

FIDELITY-PHILADELPHIA TRUST COMPANY, and ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased,

Petitioners,

v.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue for the First District of Pennsylvania,

Respondent.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Petitioner herewith replies to the MEMORANDUM FOR THE RESPONDENT, calling the Court's attention to the case of

Field v. Commissioner (C. C. A. 2d).

This case was decided on July 13, 1944, and was published after the filing of the Petitioners' Brief in this case, in 1944 Prentice-Hall Federal Tax Service, paragraph 62,664, and in Commerce Clearing House Inheritance,

Estate and Gift Tax Service, paragraph 10,134. Briefly, the facts of that case, leaving out complicating details, were that in 1922 a decedent created a trust, reserving the income to himself for life, and thereafter to other beneficiaries. The trust was to last until the death of the survivor of two nieces, who upon the date of the decedent's death were aged 18 and 25, respectively. The face value of the portion of the trust involved was approximately One Hundred Fifty-seven Thousand Dollars ($157,000.00). Its value after the death of the two nieces was approximately Twenty-four Thousand Dollars ($24,000.00); and its value to a man of the decedent's age, after the death of the two nieces—contingent upon his surviving both nieces—was Eight Hundred Ninety-one Dollars, Eighteen Cents ($891.18).

The Tax Court included the entire principal at its face value in the decedent's estate. The Circuit Court of Appeals for the Second Circuit reversed this decision, and held that the value of the intervening estates for the lives of the two nieces should be deducted, and sent the case back to the Tax Court for calculation of the tax on that basis, namely a valuation of $24,000.00.

This case would seem to be directly in conflict with the decision in the case at bar. Here, the contingency which might bring the estate under the control of the decedent's will is far more remote than it was in the Field case.

Attention is also invited to the following statement appearing on page 8 of the Respondent's Memorandum:

> "In the present case, it is not the death of the grantor as life tenant which is significant, but the extinction by her death of the reserved power of testamentary disposition."

It is submitted that this statement is inaccurate because the death of the decedent in this case has not terminated the possibility that the funds of this trust

might pass under her will. The decedent's death had no effect in this case except to terminate her own life estate. It had no effect on the contingency which was not related to her own death.

The facts of this case, therefore, distinguish it from the Hallock case, in that the contingency there turned on the decedent's death, and only then was it resolved. In this case, the contingency does not turn on the decedent's death.

Respectfully submitted,

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No. 263

In the Supreme Court of the United States

OCTOBER TERM, 1944

FIDELITY-PHILADELPHIA TRUST COMPANY AND ROBERT A. WORKMAN, EXECUTORS OF THE ESTATE OF ANNA C. STINSON, DECEASED, PETITIONERS

v.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

CITATIONS

605442—44——1

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MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 68a–79a) and that of the Circuit Court of Appeals (R. 82–87) are unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 15, 1944 (R. 87). The petition

for a writ of certiorari was filed on July 17, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a transfer in trust made by the decedent on March 26, 1928, in which she reserved a contingent power to appoint the corpus by will, was intended to take effect in possession or enjoyment at or after death, within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. If so, whether the entire value of the corpus of the trust at the time of decedent's death should be included in the decedent's gross estate.

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the statute and regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts found by the District Court (R. 68a–72a) may be summarized as follows:

The decedent, Anna C. Stinson, of Bryn Mawr, Pennsylvania, died November 17, 1934, at the age of 51. She was survived by her two daughters. On March 26, 1928, the decedent transferred certain property in trust, the value of which at the time of her death was $84,443.49 (R. 68a). The

material provisions of the deed of the trust were to the following effect:

The income of the trust was to be paid to the settlor during her life and at her death to her daughters, aged 12 and 10 respectively at the time the trust was created, in equal shares during their respective lives. At the death of each daughter, the corpus or principal supporting her share of the income was to be paid to her descendants, *per stirpes*. In the event of the decease of either daughter without leaving descendants surviving, the corpus or principal of such daughter's share was to be added to the share of the other daughter, if then living, or of her then surviving descendants, *per stirpes*. In the event of the death of both daughters of the settlor without leaving descendants surviving, the corpus or principal of the trust estate was to be paid to such person or persons and upon such estate or estates as the settlor by her last will and testament directed, or, in default of such appointment, to certain designated charitable institutions, share and share alike (R. 69a–70a).

By will executed June 6, 1930, the decedent exercised the power vested in her by the trust deed and appointed the income from the property to her four brothers and sisters during their respective lives, share and share alike, in the event that at the time of the decease of the last survivor of her daughters there should be no descendants of

either then living; and, upon the decease of any brother or sister, the decedent appointed the corpus providing the income of such sister or brother to certain named charities, differing somewhat from those named in the deed of trust (R. 71a–72a).

Since the decedent's death, there have been born to her two daughters three children who were living at the time of the decision below (R. 72a).

The trust was testamentary in character and was intended as a substitute for a testamentary disposition in that it was intended to take effect in possession or enjoyment after the death of the decedent (R. 72a).

The executors of the decedent's estate did not include the value of the corpus of the trust in the decedent's gross estate (R. 68a). The Commissioner determined that the net value of the property comprising the trust shou'd be included in the decedent's gross estate in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 of the Revenue Act of 1932. (R. 23a). The deficiency which the Commissioner determined as a result of including the trust was $13,442.90 (R. 69a). This amount was paid and a claim for refund was filed.

The District Court sustained the Commissioner's denial of the refund under the statute as originally enacted (R. 73a–79a). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 82–87).

ARGUMENT

1. The Circuit Court of Appeals properly decided that the transfer made by the decedent was one intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926 (Appendix, *infra*) prior to the amendments of 1931 and 1932.[1]

Since the decedent, in addition to creating a life estate for herself, reserved the contingent right to appoint the corpus by will in the event that her two daughters died without leaving descendants, the decision here is governed by *Helvering* v. *Hallock,* 309 U. S. 106.

This case differs in two respects from the *Hallock* situations. Neither difference is of importance. In each of the cases decided in *Helvering* v. *Hallock* the grantor created an initial life interest in another person; here the grantor reserved the initial life estate for herself. There is nothing in the opinion in that case or in *Klein* v. *United States,* 283 U. S. 231, on the authority of which the *Hallock* decision rests, attaching any significance to the person in whom the initial life interest reposed. The reservation in each case of a possible reversionary interest in the grantor was the vital factor which brought the statute

[1] Since the transfer here was made in 1928, it is unaffected by either amendment. See *Hassett* v. *Welch,* 303 U. S. 303.

into operation and taxed the transfer at the grantor's death.

The other point of dissimilarity is that here there was reserved a contingent power to appoint by will, while in the *Klein* and *Hallock* cases the grantor had the contingent power to reacquire complete ownership during his lifetime. This difference, too, is not material. In the *Klein* case the grantor reserved a fee simple interest to himself in the event he outlived the life tenant. In the cases decided in *Helvering* v. *Hallock,* the reversionary interests of the grantors in the *Hallock* and *Huston* transfers were almost identical with that of the grantor in the *Klein* case. However, in the *Bryant* transfer the grantor and the life tenant had the joint power to modify, alter, or revoke the trust; upon the death of either, the survivor had the sole power to do so. In the event that the life tenant died before him, the grantor was to receive the income for life and at his death the principal was to be paid to his estate if the trust had not been modified or revoked. The reservation to the grantor in the *Bryant* case was properly considered, for the purpose of the taxing statute, as being indistinguishable from the reservations involved in the other cases.

In the *Bryant* case the grantor could have reacquired complete ownership if he had outlived the life tenant and had revoked the trust. In

the other cases the grantor would have been vested with complete ownership upon the happening of the contingency. Here the grantor had a life interest and the power to make a testamentary disposition effective on the happening of the contingency. If Section 302 (c) were being relied on in this case to tax the interest which the grantor retained for her own enjoyment, it might be important to discuss the relative economic importance of a life estate which is coupled with dispositive power at death, and a life estate with dispositive power during life. But that is not what is being taxed. What is being taxed is a transfer made during decedent's lifetime which left succeeding interests uncertainly defined until her death, since, if the contingency happened before her death, all succeeding interests might pass under her will and those interests would then derive in possession and enjoyment from her death rather than from the transfer in trust. Section 302 (c) is therefore applicable.

Petitioners seem to argue (Br. 21–22) that the application of the *Hallock* case depends upon the degree of probability that the contingency may occur. It is submitted that this Court did not, in removing from consideration the "niceties of the art of conveyancing" and "elusive and subtle casuistries" of the law of property,[2] erect in their stead the laws of probability as a basis for de-

[2] *Helvering* v. *Hallock*, 309 U. S. 106, 117, 118.

termining taxability. Moreover, it may be observed that the contingency here is in some respects less remote than that in the *Bryant* case, in which the life beneficiary had the power, after the death of the grantor, to prevent the corpus from reverting to the grantor's estate.

Neither *May* v. *Heiner,* 281 U. S. 238, *Burnet v. Northern Trust Co.,* 283 U. S. 782, nor *Hassett* v. *Welch,* 303 U. S. 303, cited by the petitioners (Br. 8–9), is contrary to the decision in the present case. In each of those cases it was held that, in transfers occurring prior to March 3, 1931 (the date on which Section 302 (c) was amended in the manner shown in the Appendix, *infra*) the reservation of a life estate, without more, did not cause the remainder to be taxable as a transfer taking effect at the death of the grantor. In the present case, it is not the death of the grantor as life tenant which is significant, but the extinction by her death of the reserved power of testamentary disposition. *Helvering* v. *Proctor,* 140 F. 2d 87 (C. C. A. 2d) (Pet. Br. 17–18) is likewise inapplicable, since in both of the cases there decided the only reservation to the grantor was a life interest. Those cases were indistinguishable from *May* v. *Heiner* and were decided on the authority of that case.

McCormick v. *Burnet,* 283 U. S. 784, also cited by petitioners (Br. 8), must be considered to have been overruled by the *Hallock* case since in both, in contrast to the other cases cited, the

grantor reserved not only a life estate but a contingent reversionary interest.[3]

The decision of the Circuit Court of Appeals in this case is not at variance with its decision in *Commissioner* v. *Kellogg,* 119 F. 2d 54 (C. C. A. 3d). There, the settlor provided (p. 56) that the estate should revert to his next of kin "in the shares provided by the laws of New Jersey" in the event that the beneficiaries failed to take. The court, in holding that the transfer was not taxable at death, pointed out that the same reversionary interest would have taken effect upon the termination of the trust even if the trust instrument had remained silent. Such is not the situation in the present case.

The gift tax cases (Pet. Br. 18–22) add nothing to petitioner's contentions. This Court has pointed out in *Smith* v. *Shaughnessy,* 318 U. S. 176, 179, that the estate and gift tax statutes are not mutually exclusive or completely integrated. An interest not taxed by the latter, or too highly contingent to diminish the value of accompanying interests for gift tax purposes, may be a significant factor in determining liability to the estate tax.

2. The petitioners claim that even if Section 302 (c) is applicable, it was error to tax the value, determined as of decedent's death, of the

[3] The provisions of the trust are set forth in the opinion of the Circuit Court of Appeals, *Commissioner* v. *McCormick,* 43 F. 2d 277 (C. C. A. 7th), Footnote 1.

entire corpus. It is asserted that the value of the life estates of the daughters must be excluded (Pet. Br. 23–28). The meaning of the *Hallock* case and the Treasury Regulations, cited by petitioner, has been misconceived.

As previously pointed out, the *Hallock* case differs from the present one since there the grantor created the initial life estate in another person. While that difference is not important in determining whether anything is taxable at the grantor's death, it is material in determining what is to be taxed. The initial life estate in the *Hallock* case, which began in enjoyment at the time of the transfer and continued after the settlor's death, was neither enlarged nor diminished by the death of the settlor. Therefore it was properly excluded from the taxable estate; for the death of the settlor was not its generating source.

Since the initial life estate was in the grantor in this case, there was no life interest outstanding at the time of her death. All succeeding interests took effect at that time. Those interests, accordingly, were properly included in the measure of the property taxable at her death.

As the court below made clear (R. 85–86), Article 17 of Treasury Regulations 80 (1937 edition) (Appendix, *infra*) contains nothing in conflict with the manner in which the tax was determined in the present case. The regulation was

promulgated to reflect the *Hallock* decision. It does so accurately.

Field v. *Commissioner* (C. C. A. 2d), decided July 13, 1944 (1944 P-H, par. 62,664), appears to be in conflict with the decision below upon the second issue presented. We believe, however, that the *Field* case was decided incorrectly and that the decision in the present case is correct. The Government at present intends to petition for a writ of certiorari in the *Field* case. The apparent conflict in decisions would warrant this Court in granting the writ of certiorari in this case to review the second question.

CONCLUSION

The decision of the Circuit Court of Appeals upon both questions presented is correct. There is no conflict in decisions with respect to the first question, but there is a conflict concerning the second question. If the Court determines that the writ should be granted, it is respectfully suggested that review be limited to the second question.

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AUGUST 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by the Act of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full con-

sideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning this title.[1]

* * * * *

Treasury Regulation 80 (1937 Ed.):

ART. 17 [as amended by T. D. 5008, 1940-2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since

[1] The italicized portion represents the amendment made by the Act of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932.

in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its

decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 263

In the Supreme Court of the United States

OCTOBER TERM, 1944

FIDELITY-PHILADELPHIA TRUST COMPANY AND ROBERT A. WORKMAN, EXECUTORS OF THE ESTATE OF ANNA C. STINSON, DECEASED, PETITIONERS

v.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

CITATIONS

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 73a) is unreported. The opinion of the circuit court of appeals (R. 82) is reported in 142 F. 2d 838.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 15, 1944 (R. 87). The petition for a writ of certiorari was filed on July 17, 1944, and was granted on October 9, 1944, on a

limited basis (R. 88). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the full value, at decedent's death, of property transferred in trust for the decedent for her life, then to the decedent's two daughters for their lives, if they survived her, and then to her daughters' descendants, if any, should be included in decedent's gross estate under Section 302 (c) of the Revenue Act of 1926, when the decedent retained a testamentary power of appointment over the property, to be effective if her daughters died without leaving descendants.[1]

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set forth in the Appendix, *infra*, pp. 14–17.

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[1] The petition for a writ of certiorari (p. 2) presented the following questions: (1) "whether an irrevocable transfer in trust by the decedent on March 26, 1928, with life income and a remote power of appointment reserved was intended to take effect in possession or enjoyment at or after her death within the meaning of Section 302 (c) of the Revenue Act of 1926" and, (2) "if it was, whether the entire value of the corpus should be included in decedent's gross estate for estate tax purposes or whether the value of intervening estates should be deducted." In its order granting the petition (R. 88), this Court limited its grant "to the question whether the entire value of the corpus of the trust at the time of decedent's death should be included in the decedent's gross estate", and transferred the case to the summary docket.

STATEMENT

The pertinent facts found by the district court (R. 68a–72a) may be summarized as follows:

On March 26, 1928, the decedent, Anna C. Stinson of Bryn Mawr, Pennsylvania, transferred certain property in trust, the value of which at the time of her death was $84,443.49 (R. 68a, 69a). The material provisions of the deed of trust were to the following effect: The income of the trust was to be paid to the settlor during her life and at her death to her daughters, aged 12 and 10 respectively at the time the trust was created, in equal shares during their respective lives. At the death of each daughter, the corpus or principal supporting her share of the income was to be paid to her descendants, *per stirpes*. In the event of the decease of either daughter without leaving descendants surviving, the corpus or principal of such daughter's share was to be added to the share of the other daughter, if then living, to be held upon the same trust as her original share, or to the share of her then surviving descendants, *per stirpes*. In the event of the death of both daughters of the settlor without leaving descendants surviving, the corpus or principal of the trust estate was to be paid to such person or persons and upon such estate or estates as the settlor by her last will and testament directed, or, in default of such appointment, to certain designated charitable institutions, share and share alike. (R. 69a–70a.)

By will executed June 6, 1930, the decedent exercised the power vested in her by the trust deed and appointed the income from the property to her four brothers and sisters during their respective lives, share and share alike, in the event that at the time of the decease of the last survivor of her daughters there should be no descendants of either then living; and, upon the decease of any brother or sister, the decedent appointed the corpus providing the income of such sister or brother to certain named charities, differing somewhat from those named in the deed of trust (R. 71a–72a). The trust was testamentary in character and was intended as a substitute for a testamentary disposition in that it was intended to take effect in possession or enjoyment after the death of the decedent (R. 72a).

Mrs. Stinson died on November 17, 1934, at the age of 51, and was survived by two unmarried daughters (R. 68a). Since her death, the decedent's daughters married; three children, living at the time of the decision below, were the fruit of these marriages (R. 72a).

The executors of the decedent's estate did not include the value of the corpus of the trust in the decedent's gross estate (R. 68a). The Commissioner determined that the net value of the property comprising the trust should be included in the decedent's gross estate (R. 23a, 69a). The deficiency which the Commissioner determined as a result of including the trust property was $13,-

442.90 (R. 69a). This amount was paid and a claim for refund was filed (R. 69a).

The district court sustained the Commissioner's denial of the refund (R. 80a) and the court below affirmed (R. 87).

SUMMARY OF ARGUMENT

The circuit court of appeals properly held the full value of the trust corpus includible in the decedent's gross estate because she had retained not only the income for life but also the power to appoint the takers of the corpus in the event of the death of her two daughters without leaving surviving descendants. Not until the death of the settlor leaving her daughters surviving could it be known whether any interests created by the trust would pass or whether the property would pass by virtue of her testamentary appointment. The disposition of the entire property was held in suspense until the death of the decedent, and, therefore, the full value should be included in her gross estate.

The decedent herself having retained the income for life, there was no outstanding life estate at her death and hence no basis for reducing the value of the corpus in respect of any estate.

ARGUMENT

THE FULL VALUE OF THE TRUST PROPERTY WAS PROPERLY INCLUDED IN THE GROSS ESTATE

The court below decided that the transfer made by the decedent in trust was "intended to take

effect in possession or enjoyment at or after death". Section 302 (c) of the Revenue Act of 1926 (Appendix, *infra,* p. 14). This holding, which must be taken as correct on this limited review (*supra,* note 1), makes unnecessary consideration of petitioner's contention (Pet. 7) that the reservation of the "remotely possible reversion or power of control" be "disregarded for estate tax purposes". Considering only whether any deduction from the value of the trust property is warranted, we submit that the instant case is controlled by *Helvering* v. *Hallock,* 309 U. S. 106, and that the full value of the trust property is properly includible in the gross estate.

In the *Hallock* case, the decedent had created a trust to pay the income to his wife for life and upon her death to deliver the principal to the grantor if living. If he should not then be living the property was to go to his children. The grantor predeceased his wife, and this Court held that the value of the corpus, less only the value of the wife's outstanding life estate, was properly includible in the gross estate as a transfer intended to take effect at or after death. In *Rothensies* v. *Huston,* decided with the *Hallock* case and covered by the same opinion, the decedent conveyed property in trust, the income to be paid to his prospective wife during her life; if she should die during the lifetime of the grantor he was to get back the principal, but if after the marriage she should survive him the principal

was to go outright to her. The wife outlived her husband, and this Court held that the full value of the property, less only the value of the outstanding life estate, should be included in the gross estate under Section 302 (e). In *Bryant* v. *Helvering,* which was also decided at the same time as the *Hallock* case and covered by the same opinion, the trust income was payable to the settlor's wife for life and upon her death to the settlor himself should he survive her. Upon the death of the survivor of the settlor and his wife, the principal was to go to his estate unless the trust had been modified or revoked pursuant to a provision giving the settlor and his wife, jointly during their lives, and to either of them after the death of the other, power to modify or revoke. The wife survived the husband, and this Court approved the inclusion in his gross estate of the value of his "vested reversionary interest" (309 U. S. 106, 116) which was the full value of the property minus the life estate of his wife. *Estate of Bryant* v. *Commissioner,* 36 B. T. A. 669, 671–676. In deciding these cases this Court expressly overruled its own prior decisions in the *St. Louis Trust Co.* cases (*Helvering* v. *St. Louis Trust Co.,* 296 U. S. 39; *Becker* v. *St. Louis Trust Co.,* 296 U. S. 48), and remarked that in *Klein* v. *United States,* 283 U. S. 231, which it reaffirmed, "By bringing into the gross estate at his death that which the settlor gave contingently upon it, this

Court fastened on the vital factor." "The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment." 309 U. S. at 110–112.

It is true that the string or tie which was retained by the grantor in this case, a contingent power of appointment over the corpus, is different from the interest in the corpus retained by the decedents in the *Hallock* cases. But the retention of a power of control over the corpus, even if remote, is sufficient to carry the entire gift to the daughters into the gross estate where death terminates the retained power. "Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death." *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, 47 (dissent).

And while it is true that at decedent's death it still could not be known whether the trust provisions would effectively carry the property in remainder to her grandchildren, or whether, if the daughters died without leaving descendants, the property would pass by virtue of the power of appointment, Section 302 (c) sweeps into the gross estate interests "intended to take effect in possession or enjoyment" not only "at" but "after" death. "That is precisely what the fed-

eral estate tax hits—an exercise of the privilege of directing the course of property after a man's death." *Estate of Rogers* v. *Commissioner,* 320 U. S. 410, 413. Whether the remainder passes as provided in the trust or under the power, its passage will be attributable to decedent's death, for not until then could it be definitely known that the decedent would not survive her daughters and that the gifts in trust would be operative at all. The passage of the entire trust property is "conditioned upon decedent's death" within the meaning of Article 17 of the Regulations (Appendix, *infra,* p. 15). Death cut the string which the decedent selected to hold in suspense the ultimate disposition of the entire property. Consequently the entire value of the trust property must be included in the gross estate. Cf. *Tyler* v. *United States,* 281 U. S. 497, 503, 504; *United States* v. *Jacobs,* 306 U. S. 363, 371; *Porter* v. *Commissioner,* 288 U. S. 436, 444.[2]

[2] Implicit in the decision of the court below in this case, now controlling (see *supra,* pp. 5–6, and note 1), is the conclusion that none of the interests transferred by the decedent are to be excluded from her gross estate simply because it is likely that the transfer of all of the interests, except the grantor's life estate, constituted a gift when the trust was created (*Robinette* v. *Helvering,* 318 U. S. 184). If some part is to be included in the estate, though it was the subject of an *inter vivos* gift, this consideration must be similarly rejected as a reason for not including the whole. In any event, Congress anticipated no complete correlation between the estate and gift taxes (*Smith* v. *Shaughnessy,* 318 U. S. 176), and, incidentally, the transfer in this case was made in 1928 when there was no gift tax.

This conclusion is also supported by *Commissioner* v. *Washer*, 127 F. 2d 446 (C. C. A. 6), certiorari denied, 317 U. S. 653, where the court said (p. 449):

> If *Helvering* v. *Hallock* furnishes, as it purports to do, a practical formula for determining the measure of the gross estate at the time of death, it is not by us to be refined or evaded by limiting inclusion in gross estate to the value of a possibility of reverter which real though it be, in respect to postponing complete passing of property until the event of death, is yet an intangible element in respect to value, and so incapable of measurement.[3]

See also 1 Paul, *Federal Estate and Gift Taxation*, Sec. 7.24–29, pp. 368–387; Warren, *Correlation of Gift and Estate Taxes*, 55 Harv. L. Rev. 1, 27–30 (1941).

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[3] While the question of valuation alone and not the question of whether there was a taxable transfer is before this Court, insofar as the problems merge into one another, we feel that it is incumbent upon us to call this Court's attention to the various views taken by the lower courts on the question of taxability. E. g., compare *Schultz* v. *United States*, 140 F. 2d 945 (C. C. A. 8); *Goldstone* v. *United States*, decided by the Second Circuit on August 11, 1944 (C. C. H. Inheritance, Estate and Gift Tax Service, par. 10, 139); *Central Hanover Bank & Trust Co.* v. *United States*, decided by the Court of Claims on November 6, 1944 (4 P–H Tax Serv., par. 62,757); with *Lloyd's Estate* v. *Commissioner*, 141 F. 2d 758 (C. C. A. 3d), and *Estate of Cain* v. *Commissioner*, 43 B. T. A. 1133, 1139; *Gaston Estate* v. *Commissioner*, 2 T. C. 672, with *Biddle* v. *Commissioner*, 3 T. C. 832, pending on appeal (C. C. A. 3); *Allen* v. *Commissioner*, 3 T. C. 844, pending on appeal (C. C. A. 2).

A. NEITHER THE DAUGHTERS' LIFE ESTATES NOR THE ESTATES OF THEIR DESCENDANTS WERE "OUTSTANDING" AT THE DECEDENT'S DEATH WITHIN THE MEANING OF THE APPLICABLE TREASURY REGULATIONS

In the *Hallock, Houston* and *Bryant* cases (*supra,* pp. 6–8), it was conceded that the value of the outstanding life estate should be excluded because it took effect in possession or enjoyment when the trust was created. Cf. *United States* v. *Pelzer,* 312 U. S. 399; *Ryerson* v. *United States,* 312 U. S. 405; *Commissioner* v. *Brandegee,* 123 F. 2d 58, 62 (C. C. A. 1). And after this Court's decision in the *Hallock* case, the Regulations were amended in conformity with that concession. Treasury Regulations 80 (1937 ed), Article 17, as amended, (Appendix, *infra,* pp. 15–17); Treasury Regulations 105, Sec. 81.17. In the instant case, however, there is no basis for any such concession, because at the time of decedent's death, there were no outstanding estates; the grantor retained not only a contingent power over the corpus but also reserved to herself the income for life.[4]

In the situations before the Court in the *Hallock* case, the first life estate created as of the date of

[4] Petitioner contends (Br. 26–27) that the estates of the daughters and their descendants were outstanding within the meaning of the Treasury Regulation. In the alternative, petitioner urges that the Regulation is in error if an "outstanding" estate is only one which is in "course of enjoyment". But if it be thought that the Regulation does make an illogical distinction, it is in favor of a reduction in the includible value and is, if anything, a concession to taxpayers. See Paul, *op. cit. supra,* and Warren, *op. cit. supra.*

the indenture was not in favor of the settlor, as here, but in favor of the settlor's wife. When the settlor died, his wife surviving, the enjoyment of her life estate remained unaffected. In this case, however, the daughters' life estates took effect in possession and enjoyment only upon decedent's death. Until that time, she alone enjoyed the property and it could not definitely be known whether the daughters or their descendants, if any, would survive the decedent. The grantor's life estate ceased at her death and the succeeding life estates then came into enjoyment. And since the daughters' descendants could take only if the daughters took or if they survived the decedent, there were no estates outstanding when decedent died, and no interest in the property remained unaffected by that event.

Field's Estate v. *Commissioner,* 144 F. 2d 62 (C. C. A. 2d), petition for certiorari filed by the Government (No. 578) on October 10, 1944, permitted the exclusion of any estates which might conceivably intervene between the decedent's death and the payment of the corpus. In that case, the decedent had the income for life together with the right to get the property back if he should survive his two nieces. The court held that the value of the property must be discounted for the period of the life expectancy of the survivor of the two nieces. We submit that the decision in the *Field* case is wrong. As in this case, there was no outstanding estate within

the meaning of the Regulations, and since the ultimate disposition of the entire corpus was effectively suspended during the decedent's lifetime, the entire value thereof should have been included in his gross estate when he died.

CONCLUSION

Not until the decedent's death could it be known whether any of the gifts in trust would be effective. There were no outstanding estates at the time of her death. The full value of the property transferred in trust was properly included in decedent's gross estate, and the judgment of the court below should, therefore, be affirmed.

Respectfully submitted.

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DECEMBER, 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by the Act of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.[1]

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Treasury Regulation 80 (1937 Ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other

[1] The italicized portion represents the amendment made by the Act of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932. These amendments are not applicable to this case since the trust was created in 1928. *Hassett* v. *Welch*, 303 U. S. 303.

contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its

decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

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SUPREME COURT OF THE UNITED STATES.

No. 263.—October Term, 1944.

Fidelity-Philadelphia Trust Company and Robert A. Workman, Executors of the Estate of Anna C. Stinson, Deceased, Petitioners, *vs.* Walter J. Rothensies, Individually and as Collector of Internal Revenue for the First District of Pennsylvania.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 5, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Our attention here is directed toward the proper valuation for federal estate tax purposes of the corpus of an *inter vivos* trust where the transfer was intended to take effect in possession or enjoyment at or after death and where the settlor retained a life estate in the trust income and a reversionary interest in the corpus.

On March 26, 1928, the decedent, Anna C. Stinson of Bryn Mawr, Pa., transferred certain property in trust, the value of which at the time of her death was $84,443.49. The income of the trust was to be paid to the settlor during her life and at her death to her daughters (aged 12 and 10 at the time of the creation of the trust) during their respective lives. At the death of each daughter, the corpus supporting her share of the income was to be paid to her descendants. If either daughter died without leaving surviving descendants, the corpus of her share was to be added to the share of the other daughter or of the surviving descendants of the other daughter. But if both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. In default of such appointment, the corpus was to go to certain named charities.

The decedent exercised the power of appointment in a will made in 1930. She died in 1934 at the age of 51, leaving two unmarried

daughters. The latter have subsequently married and both have children.

The Commissioner determined that this arrangement was a transfer in trust intended to take effect in possession or enjoyment at or after death within the meaning of Section 302(c) of the Revenue Act of 1926, 44 Stat. 9, 70, and that the net value of all the property comprising the corpus of the trust should be included in the decedent's gross estate for estate tax purposes. The executors, however, denied that the transfer fell within the meaning of Section 302(c); they further claimed that even if Section 302(c) did apply the value of the life estates of the settlor's daughters and the value of the remainders to their surviving descendants should be deducted from the value of the trust assets for tax purposes.

The executors paid a tax on the full value of the trust assets and filed this claim for refund of the tax. The District Court denied recovery and the court below affirmed. 142 F. 2d 838. Conflict with *Field's Estate* v. *Commissioner*, 144 F. 2d 62, led us to grant certiorari limited to the question of whether the entire value of the corpus of the trust at the time of decedent's death should have been included in the decedent's gross estate.

The courts below, utilizing the principles set forth in *Klein* v. *United States*, 283 U. S. 231, and *Helvering* v. *Hallock*, 309 U. S. 106, correctly held that the decedent's transfer in trust in 1928 was one intended to take effect in possession or enjoyment at or after death within the meaning of Section 302(c) of the Revenue Act of 1926, prior to the amendments of 1931 and 1932. While the matter of valuation was not argued and was not directly in issue in those cases, the inescapable consequence of the principles enunciated there and in the dissenting opinion in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, 46, is to include the entire trust corpus in the gross estate of the decedent under these circumstances.

Section 302(c) itself provides for the inclusion within the gross estate of property "to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death." As we said in *Helvering* v. *Hallock*, *supra*, 110, 111, this provision "deals with property not technically passing at death but with interests theretofore created.

The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment." Cf. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347. The taxable gross estate, in other words, must include those property interests the ultimate possession or enjoyment of which is held in suspense until the moment of the grantor's death or thereafter.

Tested by that standard, the entire corpus of the trust should have been included in the decedent's gross estate and an estate tax levied on its net value at the date of decedent's death. The ultimate disposition of all the trust property was suspended during the life of the decedent. Only at or after her death was it certain whether the property would be distributed under the power of appointment or as provided in the trust instrument. The life estates of the daughters were contingent upon their surviving their mother and took effect in enjoyment only at the death of the latter. The remainder interests of the descendants of the daughters were contingent upon their surviving both the decedent and the daughters and took effect in possession only after the death of the decedent. Thus until the moment of her death or until an undetermined time thereafter the decedent held a string or contingent power of appointment over the total corpus of the trust. The retention of such a string, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, subjected the value of the entire corpus to estate tax liability.

It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock*, *supra*, 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that

would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

We are not concerned here with determining whether the values of any property interests or intervening estates not affected by the decedent's death and not subject to the contingent power of appointment should be deducted from the value of the corpus. The value of the life estate retained by the decedent obviously cannot be deducted. And the life estates of the daughters and the remainder interests of their surviving descendants were all subject to divestment by the contingent power of appointment and were freed from this contingency only at or after the decedent's death. There is thus no basis for deducting their values as suggested by petitioners.

Affirmed.

Mr. Justice DOUGLAS, concurring.

The District Court found that this trust was "intended to take effect in possession or enjoyment at or after" the death of the decedent. The Circuit Court of Appeals agreed. Certiorari was not granted on that question but only on the question whether the entire value of the corpus of the trust at the time of decedent's death should be included in her gross estate. So in this case, as in *Commissioner* v. *Field*, No. 578, decided this day, we are not faced with the question whether *May* v. *Heiner*, 281 U. S. 238, should survive *Helvering* v. *Hallock*, 309 U. S. 106. On the findings of the District Court, it is plain that the entire corpus must be included in decedent's gross estate by virtue of § 302(c) of the 1926 Act unless the value of the life estate must be deducted. The value of the life estate deducted in the *Hallock* case was the life estate in the settlor's wife. It was excluded because it took effect in possession or enjoyment when the trust was created. The life estate which the decedent reserved to herself is obviously in a different category. It is not an "outstanding life estate" within the meaning of Treasury Regulations 80, Art. 17.

I would rest the decision there and reserve judgment on the other questions adverted to in the opinion of the Court.